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THE

MUNICIPAL REPORTS,

CONTAINING

REPORTS OF CASES ARISING UNDER THE MUNICIPAL AND SCHOOL LAWS OF UPPER CANADA.

EDITED BY

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MUNICIPAL REPORTS.

OTTAWA DISTRICT COUNCIL v. LOW ET AL.

A Municipal Council can, in their corporate name, enforce payment of debts due to the District, where neither the magistrates nor their treasurer could have sued formerly; but they cannot vary or abridge the rights of the parties, or alter any contract express or implied.

(Q. B., T. T. 6 Vic.)

DEBT for money had and received, money paid, &c. On the trial, it was proved that in 1830, the Justices in Quarter Sessions in the District of Ottawa made an order that the moneys arising from the wild land tax, in the Township of Cambridge, applicable to roads, should be expended in opening the road between the 2nd and 3rd concessions of that Township; and they directed the money to be paid to the defendants, road commissioners, for that purpose. The defendants had purchased lands sold for arrears of taxes in that Township, in conjunction with Mr. Hamilton, since deceased; and apprehending that the sale was illegal, and their titles invalid, they advanced a right to retain this money to indemnify them against their probable loss, a right which the Justices would not recognise, though they forebore to press the re-payment of the money, until September, 1840, when they made an order that the amount, £205 13s. 11d., should be paid into the District treasury, for which payment, by another order in April, 1841, time was given to the defendants until the April sessions of 1842. The receipt for the money was signed by only two of the commissioners, and the District Council, having the control of the financial affairs of the District, sought to recover the money which the defendants had not repaid. The defendants objected that the order of Sessions in 1830, constituted an agreement with them, and they could only be sued for not expending the money on the roads, as the order to that effect had never been rescinded; that the plaintiffs could not sue for this cause of action, and that at any rate only the two commissioners who signed the receipt were liable, and not the third also. These points

being overruled, they offered, as a set-off, their claim to indemnity for moneys expended in the purchase of lands illegally sold for the wild land tax, but this being rejected, the plaintiffs obtained a verdict for £233 0s. 2d., being the sum originally paid to the defendants, and interest from the time of its being finally ordered to be paid in April, 1842. The defendants obtained a rule *nisi* for a new trial on the objections taken at *Nisi Prius*, and for the rejection of their set-off.

ROBINSON, C. J., delivered the judgment of the Court.

The rejection of the set-off was correct, as the nature of the claim, and the whole circumstances of the case are decisive objections against it. Then can the plaintiffs maintain this action? We think they can. Undoubtedly the Justices had, by law, in the first instance, a controlling power over the expenditure of the money for the purposes to which the law appropriated it. The defendants took it under the order for the expenditure, and they then became public accountants, and had no course but to execute the trust, or refund the money. The Justices are not shown to have ever acquiesced in their claim to apply this road money to indemnify themselves, though, by a forbearance which produced difficulty, they abstained for years from taking a definite line of proceeding. That the money was so paid over in the first instance, as to make all three defendants accountable for it, is clear on the evidence given; and they have all been shewn to have acted afterwards in a way that plainly admitted themselves to be all equally responsible. If, under these circumstances, these defendants, as road commissioners, had been called on by the Crown in a proper legal proceeding, as public accountants, to pay back the money, there can be no doubt but they would have been compelled to do so; then we have only to consider whether the District Council are not by law enabled, as representing the District for such purposes, to sue upon such a claim as the Crown could, by an ordinary proceeding in the Exchequer, have enforced for the benefit of the District. It is contended that they can only sue where the Justices or their treasurer could have sued, before the District Councils were constituted. But we are of opinion that under the 43rd section of the 4 & 5 Vic. cap. 10, the District Council can, by proper legal proceedings in their corporate name, enforce payments of debts due to the Districts, where neither the Justices nor the treasurer could formerly have sued for such debts, but that they can only enforce the payments on the same terms or conditions that existed before; that is, they cannot abridge or vary the rights of the parties, or alter any contract express or implied. The convenience of suing as legally repre-

senting the District, is a new facility conferred by the Act, for generally the Queen's name must have been used before in legal remedies against public accountants or debtors to the District.

Rule discharged.

Anterior to 1841, Municipal affairs were to some extent under the control and management of Justices in Sessions. In that year, the inhabitants of the several Districts of Upper Canada were declared to be Corporations, with the usual corporate powers: (4 & 5 Vic. cap. 10.) Since then, not only have Districts been abolished, and Counties substituted, but the inhabitants of lesser Municipalities, such as Townships, Towns, and Villages, have also been erected into Corporations, (12 Vic. cap. 81,) and the Municipal system of government has been in consequence much improved and extended. The system has been, from the first, one of decentralization; and has so far, upon the whole, been found to work very advantageously. (Consold. Stats. U. C. cap. 54.)

Keating v. Simcoe District Council.

An action of debt is maintainable against a municipal council upon a contract entered into with the building committee for building the gaol and court house of the District, before the District was set apart, and it is sufficient in the declaration to describe the building committee as such, without naming the persons of whom it was composed.

(Q. B., E. T. 7 Vic.)

Demurrer.—The plaintiff declares in debt against the Council of the District of Simcoe. For that whereas the building committee for building the court house and gaol of the District of Simcoe, duly nominated and appointed by the Justices of the peace within the County of Simcoe, under and by virtue of the Statute in that behalf made and provided, to contract for and superintend the erection and completion of the said court house and gaol, under the control of the said Justices (and on behalf of the inhabitants of the then District of Simcoe), acting under and by virtue of such nomination and appointment as aforesaid, and on behalf of the inhabitants of the said intended District, and under the control of the Justices aforesaid, on the first day of January in the year of our Lord 1843, was indebted to the plaintiff in £350, for the price and value of work then done in and about the erection and completion of the said gaol and court house, by the plaintiff, for the said building committee at their request, acting in the behalf and under the control aforesaid, and in £250, for money found to be due from the said building committee so acting as aforesaid, to the plaintiff on an account stated between them, which said several monies were to be respectively paid by the said committee, on behalf of the said inhabitants,

to the plaintiff on request. And whereas, afterwards, to wit, on 11th January, in the year last aforesaid, and while the said building committee were so indebted to the plaintiff in the said last mentioned sums of money, for and on behalf of the inhabitants of the said intended District of Simcoe, the said intended District was, in accordance with the provisions of the Statute hereinbefore mentioned, duly proclaimed the District of Simcoe, whereby and by reason of the said monies remaining due, an action hath accrued, &c. Yet neither the defendants, nor the said Justices, nor the said building committee, nor the inhabitants of the said District have paid the said sum above demanded, or any part thereof. Special demurrer, that the building committee are not named, but are assumed to have a corporate existence or power; that it is not averred or shewn that any contract, according to the Statute in that behalf, was entered into; that there is no averment of any liability or debt incurred in the name and on the behalf of the said inhabitants; and that the debt claimed is not shewn to be the lawful debt or liability of the inhabitants, or Justices, or treasurer of the said District. Joinder in demurrer.

J. H. Cameron for the defendant. The plaintiff by his pleading has assumed that the building committee have a corporate existence, as without that assumption he could not charge that they had, as such, made a contract; the names of the persons composing the committee should have been set out, and as under the Statute 7 Will. IV. cap. 2, they are empowered to contract only *in the name*, as well as on the behalf of the inhabitants of the District, it should have been averred that the contract was so made by them, to satisfy the requisites of the Statute.

Blake for the plaintiff. The declaration is sufficient Stating the contract to have been made by the building committee, does not invest them with a corporate name; they are called the building committee in the Statute, and the plaintiff only applies the name that the Legislature has given. It would be difficult, perhaps impossible, to state the names; one part of the contract may have been made at one time, and another part at another, and the committee may have been at the different times, composed of different persons. In the *Huddersfield Canal Company* v. *Buckley*, (7 T. R. 36), a committee of the commissioners of the canal was described in the same way, without noticing the individuals composing the committee. Then the contract is alleged to have been made on behalf of the inhabitants, and that must be sufficient, without charging it to have been made in their names.

ROBINSON, C. J.—The building committee are empowered by 7 Will. IV. cap. 2, sec. 14, to contract for a gaol and court house. This is not an action against them, and they are, I think, sufficiently referred to in the inducement, by the same term of "building committee," as is used throughout the Statute. It was not necessary to state their individual names. The *Huddersfield Canal Company* v. *Buckley* seems to show that the same course was taken there. Then I think that the cause of action is shewn to be a debt contracted within the scope of their authority, for work done for them to the gaol and court house; and that the amount stated is by reasonable intendment, to be taken as of and concerning the business which the building committee was authorized to contract for; the words "so acting as aforesaid" carry that meaning when read in connection with the preceding part of the declaration; they were acting under their appointment, and their appointment is stated to have been for the purpose of contracting for and superintending the erection of the gaol and court house. Then admitting that this is shewn to be a debt contracted by or through the agency of the building committee, acting within the scope of their authority, is it therefore a debt for which the District Council may be sued? That turns on the Statute 4 & 5 Vic. cap. 10. By that Act they are made a corporation, subject to be sued and capable of suing. Then is this a debt chargeable upon them as representing the District? I think it is. It is a debt of the District of Simcoe, due by it as contracted on its behalf by the building committee, which debt, under the 43rd clause of the last mentioned Act, the District Council are compelled to assume. We have already determined in the case of the *Ottawa District Council* v. *Low et al*, (Trin. Term, 1843, *ante* p. 1) that the proper interpretation of that clause is, not that the District Council can sue and be sued only where the Justices could formerly have sued or been sued, for that would be a construction which would render the 1st and 43rd sections of the Act of little value, in point of convenience, either to the District, or to persons having claims upon them. The obvious meaning of the 43rd clause is, that the contract shall not be prejudiced or altered in its *terms* and *conditions*, by their being substituted for the Justices. We have so construed the Act in favor of the District Councils, and of course the same construction must prevail against them. The Justices are liable upon the facts stated as for a debt due by the District, and by the Justices through their agents, the building committee.

MACAULAY, J., concurred.

JONES, J.—I am of opinion that the defendants are entitled to judgment, although upon some points in the case, I agree with my brethren. I do not think that it was necessary to name the individuals composing the building committee, as it is named merely as inducement, but it ought to have been alleged that there was a contract for building or completing the gaol and court house, and that it was made *in the name* as well as on behalf of the inhabitants of the District, and as these objections are pointed out by special demurrer, they are entitled to prevail.

JONES, J., dissenting.

Judgment for plaintiff.

This and the preceding case are important as shewing the effect of the change from the old system of administration of Municipal affairs by Justices, to that by local Municipal Corporations, in regard to the liabilities of the latter for debts contracted before their organization. The Municipal system as now established, is purely the creature of Statute law, and its gradual expansion to be found in the pages of recent legislation.

ASKIN v. LONDON DISTRICT COUNCIL.

A clerk of the peace cannot charge fees for any service, for the remuneration of which no provision is made by Statute or otherwise, and the payment of such fees by a District Council in accounts rendered for services in former years, will not prevent their afterwards disputing the charges in the accounts of subsequent years. If a clerk of the peace accept a salary in lieu of all fees, he is not afterwards entitled to any remuneration except such salary, and an action will not lie against the District Council for fees charged for services performed by a clerk of the peace.

(Q. B., M. T. 8 Vic.)

The plaintiff is clerk of the peace of the District of London, and brings this action of indebitatus assumpsit against the District Council —a municipal corporation, created by the Statute 4 & 5 Victoria, cap. 10, setting forth in his declaration that he was clerk of the peace of the District of London, and as such had done certain work for the defendants, at their request, to the value of £27 10s.; that such work having been done by him, he had submitted the account thereof to W. S. and D. H, duly appointed to audit the accounts of the said District; and that they did examine and audit the account, and did allow the plaintiff the said sum of £27 10s. for the said work, of which defendants had notice, whereby an action hath accrued, &c. Defendants plead, 1st—that they were never indebted in manner aforesaid, &c.; 2nd—that the

auditors did not examine and settle, or audit the account, &c.; 3rd—that the auditors did not allow to the plaintiff the said sum of £27 10s., or any part thereof, &c, Plaintiff joins issue on all these pleas. In his bill of particulars, plaintiff claims for the following particulars: first,

For making calculations on sixteen collection rolls for the assessment of one-third of a penny in the pound valuation on each inhabitant, at 15s. each roll	12	0	0
For making calculations on fifteen collection rolls for the assessment of four-fifths of a penny per acre on wild lands, as returned by assessors of Townships, on each inhabitant, at 20s.	15	0	0
To making up such rates and assessments for the treasurer of the London District	0	10	0
	£27	10	0

It was proved on the trial, that upon a report of the committee of the Justices of the peace for the District recommending that a salary of £300 be allowed to the clerk of the peace in lieu of all fees allowed by order of sessions, and which are charged in his annual accounts, the Justices did, on the 10th July, 1841, make the following order in general Quarter Sessions:—"Whereas it is considered expedient that the sum of £300, currency, be paid annually to the clerk of the peace, in quarterly payments, in lieu of all fees allowed that officer, and hitherto charged in his annual account to the District. That the said salary shall commence from the April sessions last." It was proved further, that the District auditors, having the account in question before them, had marked it audited and approved, subject to the passing of a by-law for the last items of the account, for which charges they declared there was not yet any proper authority. The other item of £12 they seem to have passed, with the remark, however, that it should be charged to the gaol fund exclusively. It was admitted by the parties, in a case agreed upon at the trial, that the item of £12 was allowed to the plaintiff under a schedule of fees established by the Justices in Quarter Sessions, in the year 1838; and further, that the items charged and at the rate at which they are charged in this account, have been allowed to the plaintiff, and that they have been allowed since the order in sessions, in 1841, limiting his income to £300. A verdict was taken for the plaintiff for £27 10s., subject to the opinion of the court on the following questions: 1st—"Whether the plaintiff is entitled, as a matter of law, to remuneration for his services claimed, there being no provision made for him in respect thereof? 2nd—Whether the order of the District Sessions, fixing his salary at £300, in lieu of all fees, precludes him from receiving recompense for these services? 3rd—

Whether the payment of the Justices, before the District Council Act was passed, and by the District Council since the Act, of similar charges for the same services in former years, and since the order was made fixing the salary, is binding upon the District Council, and gives to the plaintiff a legal right to recover for such charges in this action?

J. H. Cameron, counsel for plaintiff.

A. Wilson, counsel for defendants.

ROBINSON, C. J.—Upon the first of these questions, we are of opinion that the plaintiff is not legally entitled to a remuneration for the services in question, as he has not shown a specific authority for each specific charge, or for any of them. The clerk of the peace is an officer serving the Crown, and appointed to discharge public duties, which most of them concern the administration of justice, though there are other duties imposed upon him by act of parliament, or under authority of acts of parliament; and with respect to all his official services, we are of opinion that he cannot be held entitled to any other recompense than has been expressly assigned to him by law. It is a general principle, that every fee to a public officer must have a legal origin. A court and jury have no authority to tax the public revenue, by awarding an allowance as upon a quantum meruit. Upon the second question, we are not aware under what authority the Justices in Quarter Sessions may have supposed that they had a right to order a fixed salary to the clerk of the peace, in lieu of fees to which he was entitled by law. They could undoubtedly make such an agreement with his assent—so far, at least, that he could not complain of it as an injury; but whether he assented to it or not, if it be true, as we gather from the case stated, that the plaintiff has received the salary of £300, given in the terms in which it was ordered, we are of opinion that he could not make charges against the District for such services as the services he rendered within the period for which he has received the salary, for he would by that means be doubly remunerated for the same service. Upon the third point, we are of opinion that the District Council are not bound by former payments, whether made by themselves or by the Justices, since they are not bound to pay any fee to the clerk of the peace for public services rendered by him in his office, and not under their order, except where his claim to such fee is established by a positive law. The 1st, 43rd, and 44th clauses of the 4 & 5 Vic., cap. 10, seem to be the only provisions in the District Council Act bearing on this case. The first clause merely gives to these corporate bodies capacity to sue, and makes them subject to be sued, which

latter means, of course, nothing more than that they may be sued for such demands as they are liable to answer, either upon their contract, or upon the general principles of law. There is nothing, in our opinion, in the 43rd and 44th clauses inconsistent with what we now hold. The first of them refers evidently to contracts made by or with the District, and the latter only assures to the clerk of the peace, and other officers, the same charges for services which by the Act are found to be under the control of the Council, as had before been granted to him (that is, by law) until the Council should order otherwise. The case submitted to us does not in terms refer to the general and most important question of any, namely—whether an action will lie for the clerk of the peace against the District Council upon a demand of this description, that is, whether such a remedy is open to him at all. But the learned counsel, in the argument, discussed the point, and we take it for granted that our judgment is expected upon it. It is our opinion, then, independently of all peculiar features in this case arising from the order of sessions, and previous payments, that the clerk of the peace cannot maintain this action, first, because he has shewn no legal right to the recompense he claims. It is an express provision of the statute of Westminster (3 Ed. I., cap. 26), that no sheriff, or other king's officer shall take any reward to do his office, but shall be paid of that which they take of the king; and he that so doth, shall yield twice as much, and shall be punished at the king's pleasure. Lord Coke, in his commentary on the statute (2 Inst.), says, that under the words "other king's officer," are classed escheators, coroners, bailiffs, gaolers, the king's clerk of the market, and other inferior ministers and officers of the king, whose offices in any way concern the administration or execution of justice, or the common good of the subject, or the king's service, and that they can none of them take any reward for any matter touching their offices but of the king. The true meaning of this, of course, is, that unless when an act of parliament gives them a right to look for a recompense in any other quarter, they can take nothing for any service rendered by them in their office, except of the king. And this statute is said to be made in affirmance of a fundamental maxim of the common law,—quod non faciant vicecomites vel alii ministri regis premium mercedem vel aliquid pro officio suo faciendo, sed tantum de fœdis suis a domino rege sint contenti. And Lord Coke makes upon this subject this pointed remark, "It is a certain and true observation, that the alteration of any of those maxims of the common law is most dangerous, whereof you shall elsewhere read some instances whereunto you may add this ancient maxim affirmed by an act of parlia-

ment, for whilst sheriffs and other ministers of the king, whose offices any way did concern the execution of justice, or the good of the common weal, could take no fee at all for doing their office but that of the king, then had they no colour to exact anything of the subject, who knew that they ought to take nothing of them. But when some acts of parliament, changing the rule of the common law, gave to the said ministers of the king fees, in some particular cases to be taken of the subject, whereas, before, without any taking at all, their office was done, now, no office at all was done without taking. But at this day (Lord Coke adds), they can take no more for doing their office, than have been since this act allowed to them by authority of parliament." These duties of the clerk of the peace, in preparing assessment rolls, or making calculations upon them, are duties discharged in obedience to acts of parliament, or in consequence of their providing which makes it his duty. And it is a general rule, that when a duty is cast upon any one by act of parliament, and no remuneration is provided for the doing it, the party is to perform the duty without remuneration. *Graham et al* v. *Grill*, (5 M. & Sel. 295), in which case also the court determined that the sheriff's claim to poundage, is not in the nature of a claim for work and labour, and that when it is not expressly conferred by act of parliament he can not claim it. (Com. Digest, Extortion E. Officer G. 15.) Then, secondly, in addition to the objection that the clerk of the peace, as a public officer, can be entitled to no fee which is not given to him by law, he cannot recover these fees in this action, because the District Council are not liable to be sued by him for any such public service, as for work and labour at their request. The modern case of *Jones* v. *The Corporation of Carmarthen*, stated in the argument, (8 M. & W. 605), is an express decision on that point meeting this case, and much resembling it in its particular circumstances. The services were public services, as these are, rendered all in obedience to the law, by a public officer, who, among other duties, had to discharge within a borough, which is a county of itself, the duties of clerk of the peace; and the officer had in that case, as in this case, to be paid on several occasions by the corporation the same fees for similar services. But when they refused to pay, and the officer was put to his legal right and to his remedy, whatever it might be, the court were clear that no action would lie, for there was no contract between the parties: the officer was not serving them, he was employed by the king, and by the law which required the services to be done; the reasons given by the court in that instance apply with increased force here, because there the officer was appointed by the corporation—

here by the crown. There are many reasons against entertaining such an action, but it is unnecessary to go into them, the point being so clear. There is a case of *Fleetwood* v. *Finch* (2 H. B.), bearing upon the main question raised here; it does not touch the question whether an action could lie against these defendants, because there it was the treasurer of the county who was sued by the clerk of assize for a fee claimed to be payable by law out of the county revenues. It was an amicable action, in which it was admitted, that the treasurer had money in his hands more than enough to pay these demands; the justices had ordered him to pay it, and he would be very willing if the plaintiff should be considered entitled to the fee. The court thought that he was entitled to the fee claimed, under a fair construction of an act of parliament, and the learned Justice Eyre says, "I agree that no officer can claim a fee except by ancient usage or act of parliament." It is, perhaps, not material to be observed, since we are clear against the action being maintainable, that upon the third issue on the record, the defendants seemed at any rate entitled to succeed, so far, at least, as regarded the two last items, if not the whole; for the plea is, that the items were not allowed by the auditors, as the declaration alleges, and they certainly were not, otherwise than subject to a contingency which is not shewn to have arisen; but upon the other grounds, our opinion is, that a verdict be rendered for the defendants.

Judgment for defendant.

In more than one respect, this is a valuable decision. It determines when a public officer is entitled to make charges for things done by him in virtue of his office; and, so far as it does, is still sound law. The fees of clerks of the peace, however, have been for years defrayed by the Province, and not by the Municipalities. (9 Vic., cap. 58—Consold. Stat. cap. 120.)

Eastern District Council v. Hutchins.

The Municipal Council Act, 4 & 5 Vic, cap. 10, invests in the Municipal Council of each District, the power of suing on a bond given to the treasurer of the District, for the due payment over to him of the rates received by the collector, and it is sufficient to aver in the declaration that the monies collected are due and payable to the treasurer.

(Q. B., H. T. 8 Vic.)

The Eastern District Council sues on a bond given on 9th January, 1837, by the defendant to Alexander McLean, Esquire, treasurer of the Eastern District, in £612, subject to a condition set out in the declaration, that if Hutchins should collect all the rates and assessments of the township of Osnabruck, for the then present year, ending first

Monday in January, 1838, so far as the law might enable him to do, and should pay all the moneys which he might so collect, except his own per centage, to the treasurer of the District, on or before the next ensuing sittings of the court of Quarter Sessions, which might be next after the first day of March, then the said writing obligatory to be void. And the declaration assigns for breaches: 1st, that Hutchins did not collect all the rates and assessments of the township of Osnabruck, for the year ending the first Monday in January, 1838, so far as the law did enable him to do; but, on the contrary, divers large sums of money in the whole amounting to a large sum, to wit, £200, remained at the said day appointed for collection thereof, and still remain uncollected, which said sums he, the said Hutchins, might by law have collected, &c. And, for a second breach, that Hutchins, after the making of that bond, viz., on, &c., 10th of January, and on divers other days between that day and the then next ensuing sitting of the court of general Quarter Sessions, next after the first day of March, 1838, as such collector, &c., did collect divers large sums of money, on account of rates for the township of Osnabruck, for the year ending on the first Monday in January, 1838, amounting in the whole to a large sum, viz., £600, over and above his per centage thereon, yet that he did not pay over to the treasurer of the District the said sum of money, on or before the then next ensuing sitting of the court of Quarter Sessions, which was next after the first day of March, 1838; but at the time of the said sitting of the court of general Quarter Sessions, to wit, on the 24th of April, 1838, a large sum of money, viz., £500, which had been so collected, remained in the hands of the said Hutchins, due and payable to the said treasurer of the District, and still remains due and payable, and which the said Hutchins hath converted and disposed of to his own use, &c.; by which breaches the said bond became forfeited, and thereby, since the passing of the Act 4 & 5 Victoria, entitled, &c., (cap. 10), an action hath accrued to the said plaintiffs to demand and have of the defendant the said sum of £612, above demanded, &c.; yet that defendant hath not paid the same to the said treasurer before the passing of the said act, or to the said treasurer or plaintiffs, since, &c. Defendant demurs specially to this declaration, objecting that there is a misjoinder of actions; that the District Council can not sue on the bond; that the statute creating municipal councils is improperly stated to have been passed in 4 & 5 Victoria; that it is not stated that any sum was uncollected beyond the collector's per centage; that the breach, that the collector did not collect all the rates as far as the law enabled him, is bad; that it is uncertain what 1st day of March is intended;

and that the monies are stated to be due and payable to the treasurer, and not to the plaintiffs. Joinder in demurrer.

Sherwood, Q. C., for plaintiffs.

Vankoughnet for defendant.

ROBINSON, C. J.—The words of the 43rd clause of the District Council Act are very comprehensive, and I think we are obliged to say, that they do vest this obligation, and the debt under it, in the District Council, so that the action is properly brought by them for a debt *due to them* under the statute. There is no ground for the objection about the misjoinder of actions; it was superfluous to say what Hutchins did with the money, so long as he did not pay it over, but is mere idle surplusage, which does not hurt, as the plaintiff plainly only brings his action for the penalty of the bond. The stating the statute to have been passed in 4 & 5 Victoria, is bad, (3 N. & M. 475; 9 Dowl. 731), but it has been held that the misrecital of the title will not vitiate the declaration. (1 G. & D. 373.) There is nothing in the objection, that it is not stated that £200, or any other sum remained uncollected, over and above the collector's per centage. Hutchins was bound to collect all the rates, and deduct his per centage from them. It is good, I think, to charge, that the defendant did not collect all the rates so far as the law enabled him, in the words of the condition. The reasonable construction of the condition refers to the next first day of March, to that next after the expiration of the year for which he was to collect, not next after the date of the bond. The money is due and payable to the treasurer of the District, as the declaration alleges.

MCLEAN, J., and HAGERMAN, J., concurred.

Judgment for plaintiffs.

The first two cases in this number are given in order to shew the liability of District Councils to be sued in their corporate capacity for causes of action which arose before Municipal Councils came into existence. This case is given to shew the right to sue under similar circumstances, and ought to be read in connexion with *O'Connor* v. *Clements et al*, the case following.

O'CONNOR V. CLEMENTS ET AL.

The Municipal Council Act, 4 & 5 Vic. cap. 10, does not vest in the Municipal Councils of the several Districts the right of suing upon bonds given by collectors of assessments to the treasurers of Districts, after that act was passed; but, on such bonds, the treasurer of a District can sue in his own name.

(Q. B., H. T. 8 Vic.)

Debt on bond, dated 14th October, 1843, by which the defendants became bound to the plaintiff in the sum of £300. The defendants

craved oyer of the bond, and the condition thereof, which were in the following form: "Know all men by these presents, that we, Gustavus Clements, collector of the rates for the township of Gloucester, in the District of Dalhousie, and William Smith, of the township of Gloucester, and Peter Tomkins, of the township of Gloucester, are held and firmly bound to Daniel O'Connor, Esquire, treasurer of the District of Dalhousie, in the sum of £300, currency, to be well and truly paid to the said Daniel O'Connor, Esquire, treasurer, as aforesaid, or his successor in office; for which payment, to be well and truly made to the said Daniel O'Connor, Esquire, we bind ourselves jointly and severally, our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated this 14th day of October, in the year of our Lord, 1843. The condition of the above bond is such, that if the above bounden Gustavus Clements shall collect all rates and assessments for the township of Gloucester for the year 1843, (for which he has been appointed), and shall pay all monies which he may so collect, except his own per centage, to the treasurer of the District, on or before the third Monday in December, in the said year 1843, then this obligation to be null and void, or otherwise to remain in full force and virtue." Special demurrer, because the said action is improperly brought in the name of the treasurer of the District of Dalhousie, instead of in the name of the District Council of the District of Dalhousie; the said writing obligatory being a collector's bond. *And also*, because the statute which authorizes the taking of such bond by the treasurer, provides the course to be pursued by him upon default, viz, that he should prepare and place before the Quarter Sessions, to be holden in the said District, after the first day of January in each year, a list of such collectors of rates as may be in arrear, and shall not have paid over the rates to the treasurer for the year in which they shall have been appointed; and that it shall be the duty of the magistrates in Quarter Sessions assembled, to issue their warrant and distrain the goods and chattels of such collectors, and cause the same to be sold, (after having given twenty days' notice of the time and place of such sale), to the amount of rates due the District, with costs thereon: and also, may proceed in like manner against the goods and chattels of the sureties named in the said collector's bond. Joinder in demurrer.

Eccles, for demurrer.

Boulton, Q. C., contra.

ROBINSON, C. J.—The defendant relies only on the first objection, viz., that according to the District Council Act, 4 & 5 Vic., cap. 10,

sec. 43, this action ought to have been brought in the name of the District Council, and cannot be sustained in the name of the obligee. But we are of opinion that the effect of that clause is only to vest in the District Council all debts, &c., due to the justices or treasurer, on the day named in it, viz., 1st January, 1842; and that it does not apply to disable a treasurer from suing upon a bond given to him after the statute 4 & 5 Vic. was passed. We have been constrained to hold that the clause does apply to bonds like this, under which a debt had accrued to a treasurer before the 1st January, 1842, because the words are really so comprehensive and express, that they take in everything that can be called a liability: (*Eastern District Council* v. *Hutchins et al*, ante page 11). We have a strong impression, however, that the legislature may have meant the provision not to extend to such cases, but only to demands upon contracts, and for work done, &c., for the District, which may have stood unascertained or unsettled, when the public affairs of the District were placed under other management than they had been. We do not, therefore, think that we are called upon, or should be warranted, in impeding the recovery of the plaintiff, upon an obligation expressly made to him, by extending the construction of the 43rd clause so as to make it prospective, when, in terms, it is retrospective only.

Judgment for plaintiff on demurrer.

McKee v. Huron District Council.

Where the plaintiff brought an action of debt on the common counts against the Huron District Council, for compensation awarded to him by a jury, for making a road across his premises, before the formation of the Huron District, and while the land formed part of the District of London, and the Huron District had, after its erection, assumed the payment of the sum awarded, the court held that the action would not lie against the Huron District Council at all, but that even if the Council had been responsible, the declaration should have been special.

(Q. B., H. T. 8 Vic.)

The plaintiff claims in the action £30, being an amount awarded to him by a jury, for compensation for making a road across his premises before the formation of the Huron District, and while the land formed a part of the District of London. Since the erection of the Huron District, the amount of this debt has been assumed by it.

The defendants contended for a nonsuit, on these facts appearing at the trial, on the ground that the debt not having been a debt of the

Huron District, but of the District of London, at the time of the formation of the District Council, the Council of the Huron District could not become liable for it, or assume it under the 43rd clause of the Municipal Council Act. And that at any rate, such assumption must be in writing, or could not be enforced, as being an engagement to pay the debt of a third party. The defendant also insisted that the declaration should have been special, and not on the common counts. Leave was given to enter a nonsuit, if the court should be of opinion that the plaintiff could not recover in this action.

Burns, for defendants moved accordingly.

Eccles showed cause.

ROBINSON, C. J.—I am of opinion, that supposing the plaintiff to have a good cause of action against the Huron District Council, his declaration ought to have been special, setting out the debt due to him by the District of London formerly, under the award, that it continued unpaid when the District of Huron became a separate District, in respect of a claim for damages for a highway made across his property, within a township now forming part of the District of Huron, and also continued unpaid when the District Council Act passed, and he should then bring the claim, if he could, under the 43rd clause of that statute. But upon the question whether the District of Huron is liable for this debt, it appears to me that it is not; I cannot derive such liability from anything contained in the District Council Act, or in the act constituting the county of Huron a separate District, 1 Vic. cap. 26. The 13th section of that statute makes against such a claim, for it provides that the justices of the London District, retaining for the use of the District generally, such portion of the rates raised in the county of Huron, as may be in proportion to the ordinary charges of the District, shall be paid over to the new District, when it shall be proclaimed, any amount beyond that, which amount might be applied towards building a gaol and court house. I see nothing to make this debt due by the District of London to the plaintiff, a charge against the District of Huron, and, therefore, nothing to make it a debt which the Council must be taken to have assumed, under the 43rd clause referred to.

JONES, J., and HAGERMAN, J., concurred. Rule absolute.

Some of the early cases given in these Reports may appear to be obsolete and useless, but are still retained with a view not merely to the completeness of the series, but for their own intrinsic value, which is not always apparent, but often in practice discovered.

In re Hamilton (Sheriff) v. Harris (Treasurer of London District).

A mandamus to the treasurer of a district to pay a sheriff's account, audited by the justices of the peace of his district in quarter sessions, was refused by the court; and the sheriff was left to his remedy against the treasurer, by indictment for breach of duty.

(Q. B., E. T., 8 Vic.)

Crawford obtained a rule nisi for mandamus to Harris, the treasurer of the London District, to pay to the sheriff of the same district, certain charges, in accounts rendered against the district for services rendered in the administration of justice, which had been audited by the justices, but which the treasurer refused to pay, because he denied the authority of the justices to sanction such charges. The charges objected to are these, viz.,

	£	s.	d.
For bringing up prisoners for trial or judgment at the assizes or quarter sessions	0	10	0
For discharging prisoners from gaol, who have been discharged without trial	0	5	0
For furnishing calendars for the judges, crown officers, clerk of the peace and chairman of the quarter sessions.	0	10	0
For returns of prisoners made to the government	0	15	0

These items the treasurer objected to pay, although they had been audited and allowed by the justices, because, as he alleged, they were not sanctioned by law, and that the sheriff could take no fee for any services rendered, except it had a legal origin. 7 Will. IV. c. 18. s. 1, 2, 5; 4 & 5 Vic. c. 10, s. 31, 59.

J. Hillyard Cameron shewed cause. The proper remedy against the treasurer, if he has committed a breach of duty, is by indictment, and not by mandamus. In England the courts have constantly refused to grant writs of mandamus against inferior officers, and the reason which has been given, and been considered sufficient for the refusal, that they would be constantly called on to act if they were to do so, will soon be equally applicable here; as in almost all the districts in the province, the magistrates and district councils are at issue upon points connected with the payment of monies out of the district fund. *Rex* v. *Bristow*, 6 T. R. 168, *Rex* v. *Johnson*, 4 M. & Sel. 515, and *Rex* v. *Jeyes*, 8 Ad. & El. 416, are all authorities against proceedings by mandamus. But even if the court were inclined to grant a mandamus, they could not do so, as the charges, for the payment of which the mandamus is demanded by the sheriff, have no legal origin; and this court has already decided in *Askin* v. *London District Council*, ante p. 6, that such services as those for which the sheriff has claimed remuneration, and for

which no allowance is made by law, must be performed, if performed at all, gratuitously.

ROBINSON, C. J.—The questions are, first, whether the justices could by law direct these charges to be paid out of the district funds? secondly, if they could, then, whether we should send a mandamus in such a case, or leave it to the sheriff to indict the treasurer for not doing his duty? In an early case in this court, where a mandamus was moved against the same party, who was then treasurer of another district, the objection was taken that the proper remedy was by indictment, if the duty was clear. The court were equally divided on that point, and the writ was not granted. The authority on which the writ was opposed was *Rex* v. *Bristow*, 6 T. R. 168. There have been others since, and the same ground has been consistently maintained. *The King* v. *Jeyes*, 3 Ad. & El. 416, is a decisive authority, and a very strong case, because there the payment out of the county rates was directed by an act of parliament, and had been ordered by a judge of assize under its provisions; but the court declined to grant a mandamus, though the treasurer disobeyed the order; and it was suggested that the justices had incited him to do so. There are no reasons assigned by the court in those judgments which do not equally apply here. We might, no doubt, legally grant the writ, but the arguments against such a course are strong; and not the less so from the circumstance that the treasurer, in this country, holds his office at the pleasure of the government instead of being removable by the justices. I will add, that besides this objection, we should not at any rate grant a mandamus in this case; for we should certainly not command the treasurer to pay the sheriff an account, though audited by the justices, which contains charges of fees having no legal origin that we are aware of, and which, on the contrary, we consider clearly illegal. Upon this point I refer to the judgment of this court in *Askin* v. *London District Council*, ante p. 6.

JONES, J., and MCLEAN, J., concurred. Rule discharged.

DEAN v. MCCARTY.

A person kindling fire on his own land for the purpose of clearing it, is not liable at all risks for any injurious consequences that may ensue to the property of his neighbours.

(Q. B., H. T. 9 Vic.)

This was an action on the case for negligently keeping fire, which the defendant had kindled on his own field in order to clear his land, by reason

whereof it spread to the adjoining land of the plaintiff, and destroyed his wood, fences, &c.

Plea, general issue.

It was proved at the trial, which took place at Cobourg before Mr. Justice McLean, that the defendant was clearing his land, and had set fire to his log heaps at a favourable time; but a high wind springing up, the fire unfortunately spread, running through the grass, notwithstanding such efforts as could be used to stop it, and some cord-wood and rails belonging to the plaintiff were destroyed. The plaintiff's witnesses acquitted the defendant of blame, and the case was left to the jury upon the question of fact, whether the defendant had or had not acted with due care and caution in setting the fire as he did, under the circumstances, and whether he did all in his power to prevent injury to his neighbours. The jury found for the defendant.

J. Hillyard Cameron moved last term for a rule nisi for a new trial for misdirection, contending that the act of the defendant was of such a nature, as made him responsible for the consequences, as it might have been prevented, and that he was bound to protect his neighbour's property from any injurious consequences from the fire which he had kindled for purposes which were beneficial to himself. He cited *Tuberville* v. *Stamp*, 12 Mod. 152, and *Vaughan* v. *Menlove*, 3 Bing. N. S. 476.

ROBINSON, C. J.—In a case in this court some years ago, of *Boulton* v. *Cooper*, of the same description as the present, we considered that the liability of the defendant must in such cases turn upon the act of negligence. And I recollect that, in at least one other case, tried also I believe at Cobourg, some years ago, the question of liability was held to turn upon the same point. I am not sure that in *any* case the verdict was reviewed in banc. There had been, however, many years before that, a case, in which Spelman was defendant, tried in the same district, in which the verdict was reviewed in banc; and according to my recollection, it was assumed there that the question to be considered was, whether the defendant had used all due care in setting fire to his clearing, and in guarding against accident. If, however, there is really any room for doubt upon the legal question, whether the party setting fire upon his own premises, in order to clear his land, is or is not liable for all the consequences to his neighbour, without regard to the circumstances; then certainly we should allow full opportunity to discuss that question, for in a country like this, it is of very great importance that the rights and liabilities of parties in this particular, should be

known, and we should be unwilling to abide by one or more decisions of the court upon such a question, if we could be convinced that they were in opposition to well settled principles of law.

It is sought here to hold the defendant liable upon a rigorous and indiscriminating application of what is undoubtedly a legal maxim, "sic uere tuo ut alienum non lædas." But this maxim is rather to be applied to those cases in which a man, not under the pressure of any necessity, deliberately, and in view of the consequences, seeks an advantage to himself at the expense of a certain injury to his neighbour; as for instance, in the use he makes of a stream of water passing through his land, which he is at liberty to apply to his own purposes, but he must not so use it as to diminish the value of the stream to his neighbour unless he has a prescriptive right.

But when we come to apply the maxim to the acts of parties on other occasions, where accident has part in producing the injury, we must see that a great part of the business of life could not be carried on under the risks to which parties would then be exposed. For instance, a man has a right to drive his carriage along the highway, and it may be granted, that he must in one sense exercise his right so as not to injure others; that is, he must not *intentionally* injure others, nor injure them by his neglect; but if we were to hold that he must at all events take care, *at his peril*, that he do them no injury, then, if his horses should be frightened by a flash of lightning, and become ungovernable, he must answer, civily at least, for the damages they might commit, though it might be to his ruin. So, again, a ship might be riding at anchor, with others, well secured and carefully attended to by a competent crew, and yet, if by the violence of a tempest she should be driven from her anchorage against another ship, and occasion her loss and injury, it could not be held that the owners were liable, on the principle that they must at their peril so use their own ship as not to injure others. In these cases, the taking the horses into the highway, and the bringing the ship to an anchor, are as much the voluntary acts of the party, as the kindling the fire was, in the case before us; but it is indispensable that allowance should be made for the necessity people are under for doing such acts, and that misfortune and neglect should not be confounded.

We cannot go so far as to hold that in all such cases, whether an act has been imprudent or not, must be taken to be proved by the result alone; though we cannot but feel that cases of great hardship may arise, and in whch the inclination of a court might generally be to throw the

loss upon the party kindling the fire, even when there might appear no clear ground for ascribing a want of due caution to him. For example a man may have a very valuable mill, and a neighbour having a small piece of wood land adjoining to it, of trifling value compared to the mill, in the process of clearing set fire, which unfortunately, by a sudden rise or change of wind, spreads so as to consume the mill in spite of all the exertions that can be used. It may be said, here is a case in which one of two innocent men must bear a serious loss, and that the misfortune would more properly fall upon the one who was a voluntary agent in setting the cause of the injury in motion, than upon him who had no share whatever in producing it. And we might perhaps be right in believing that it would have been possible for the party clearing the land, to have done it at such a time and in such a manner as would certainly have prevented the accident occuring. Still, I apprehend, that such a case must go to the jury, like all other cases of the kind, upon the question of negligence. If the principle is a sound one, it must be applied throughout; though it might indeed seem reasonable, where very valuable property might be endangered, to apply an extraordinary degree of caution and diligence, but that consideration would only affect the determination of the jury, upon the fact of what was reasonable care under the circumstances.

We must consider on the other hand, in examining the soundness of what we assume to be the principle, what would be the state of things if the person kindling the fire were to be inevitably and in all cases liable for the consequences. It is not very long since this country was altogether a wilderness, as by far the greater part is still. Till the land is cleared, it can produce nothing, and the burning the wood upon the ground is a necessary part of the operation of clearing. To hold that what is so indispensable, not merely to individual interests, but to the public good, must be done wholly at the risk of the party doing it, without allowance for any casualties which the act of God may occasion, and which no human care could certainly prevent, would be to depart from a principle which in other necessary business of mankind, is plainly settled, and always upheld. If it could be shewn, that this business of clearing land could, by means which we can suppose to be within the reach of those employed in it, be done at a time, or in a manner, that would make it wholly independent of any accident beyond the control of the party, then perhaps the bare fact of not having taking those certain means, might be held to constitute negligence; in which case, the liability for damages would always, as a matter of course, follow the injury. But as we cannot, I think, venture to hold that there are any

certain means of avoiding such accidents, it must in such case be a question of fact for the jury, whether the defendant has any negligence to answer for, or not. In Comyn's Digest, Action upon the Case for Negligence, A. 6, the law is thus laid down. "So an action upon the "case lies upon the general custom of the nation, (in other words, by "the common law;) against the master of a house, if a fire be kindled "there and consume the house or goods of another." "So, if a fire be "kindled in a yard, or close to a barn or stable, and by negligence it "burns corn, &c. in an adjoining close." As to the first part of what is here said, applying to accidental fires in houses, we know that the law has, by act of parliament, been placed on a different footing; 6 Anne, ch. 31; 14 Geo. III. ch. 78, secs. 85-86, and that it has been thought reasonable to exempt persons from answering in damages for injuries occasioned to others in such cases, even where there may have been a want of due care. But as to the latter part of the doctrine laid down, but which applies to the case of a fire spreading which has been kindled in a field to burn stubble, I do not feel that the law is any where denied to be such as Chief Baron Comyn assumes it to be. It has not in this respect been altered by statute, nor does it seem to have been, in any more modern authorities, laid down differently; neither has it been made a question whether this principle thus laid down had been carefully considered and correctly stated. We see then, that it is when by negligence the fire spreads to an adjoining close, than an action lies. And the same very learned author adds—"So it lies not if it appear that "a fire lighted for the burning of stubble, &c., by a sudden wind or other "inevitable accident, without the fault of the defendant or his servants, "burns the corn of another." Though there are many other cases which would supply reasoning from analogy in support of the principle thus laid down, yet the single case relied upon by the Chief Baron is that of *Tuberville* v. *Stamp*, reported by himself, Comyn's Reports, 32, by Lord Raymond, Salkeld, Holt, and in several other reports. And this case is certainly expressly to the point, and warrants the doctrine laid down; and, unless it can be shewn to have been over-ruled, it must govern in this case. It is reported in 12 Mod. 152, in a clear and concise manner, and stripped of anything extraneous to the main point which is the question here. On that account only I refer to the case as it is there given; for, if the report differed materially in its effect from the account of the case given by the other reporters, we should doubtless feel more safe in relying upon some of them. The action was upon the case for negligently keeping defendant's fire; and the declaration charged that defendant so carelessly kept the fire in his close,

that it burnt the plaintiff's heath in his field. After verdict for the plaintiff, it was moved in arrest of judgment, that the action would only lie on the special circumstances of the case for actual negligence, whereas here it was grounded on a supposed general custom of the nation; and, as I understand the case, the objection intended to be urged was, that the plaintiff by so stating his grievances relied upon the custom of the nation, as supplying the presumption of negligence in such cases from the mere occurrence of the accident, and when there might in fact have been no negligence; in short, that it placed the defendant on the same footing in that respect as a common carrier. Turton, Justice, observed, "There "is a difference between fire in a man's house and in the field: in "some counties it is a necessary part of husbandry to make fire in the "ground, and some unavoidable accident may carry it into a neighbour's "ground, and do injury there; and this fire not being so properly in "his custody as the fire in his house, I think this is not actionable as it "is laid. But by Holt, C. J., and the other judges, "Every man "must so use his own as not to injure another. The law is general; "the fire which a man makes in his fields is as much his fire as his fire "in his house; it is made on his grounds, with his materials, and by his "order, and he must at his peril take care that it does not through his "neglect injure his neighbour; if he kindle it at a proper time and "place, and the violence of the wind carry it into his neighbour's "ground, and prejudice him, this is fit to be given in evidence. But "now here, it is found to have been by his negligence, and it is the "same as if it had been in his house." It was after verdict, and negligence was charged in the declaration; and therefore they held they could not arrest the judgment. This contains all the doctrine under consideration. We cannot distinguish the case from the one before us. The court did not then hold that the person lighting the fire must take care at all events that it does not injure his neighbour, but it must take care that it shall not do so "through his neglect." And this doctrine, and the authority of this case, was most fully recognized in the recent case of *Vaughan* v. *Menlove*, 3 Bing. N. C. 476. What would be neglect and what not, under the circumstances of each case, may sometimes give rise to nice questions, some of which may be considered not to rest wholly with the jury, such as the necessity and sufficiency of notice to the parties whose lands adjoin of the intention to set fire. But in this case the objection taken is the broad one, that the defendant must be liable at all events—a doctrine which cannot, in our opinion, be maintained. The verdict is not moved against as being against the weight of evidence; and, if it were, we should require a strong case, when the verdict is for the defendant, to grant a second trial in such an action.

We ought not indeed to do it, unless we were clearly of opinion that the jury, upon the evidence before them, ought to have found a verdict for the other party.

Rule refused.

BALDWIN v. JOHNSON.

Where taxes were paid to the treasurer of the Home District, on lands situate in the Ottawa District, for the purpose of their being transmitted to the treasurer of the latter district, and the treasurer of the Home District not having so transmitted the amount, the lands were duly advertised for sale, and the plaintiff in order to save the lands paid the taxes to the treasurer of the Ottawa District under protest.

***Held*, that he could not maintain an action for money had and received against him to recover them back.**

(Q. B., H. T., 9 Vic.)

This was an action of assumpsit, brought by the plaintiff against the defendant to recover from him, the defendant, the sum of *4l. 7s. 10d.* received by the defendant to the plaintiff's use, to which the defendant has pleaded the general issue, and upon which issue has been joined. And by the consent of parties, it was agreed to state the facts of this case in the form of a special case for the opinion of this honorable court, and in pursuance thereof, by the order of the Honorable Christopher Alexander Hagerman, one of the judges of this honorable court, dated the 13th day of October, 1845, it has been ordered accordingly, that the facts of this case be stated in the form of a special case for the opinion of this honorable court thereon, according to the form of the statute in such case made and provided, which facts the parties state in the following case: That Francis Thomas Billings was the treasurer of the Home District, between the 1st January, 1833, and the 1st January 1843; that the late Honorable William Warren Baldwin was in his lifetime seised in his demesne as of fee of and in Lot No. 22, in the First Concession of the Township of Plantagenet, in the Ottawa District, from the said 1st day of January, in the year of our Lord 1833, to and until the time of his death, and died on the 8th day of January, in the year of our Lord 1844, seised as aforesaid of the same, and intestate as far as respects the said lot, and that since the death of the said William Warren Baldwin, the now plaintiff, as the eldest son and heir at law of the said William Warren Baldwin, has become and continued seised in his demesne as of fee of the same land, and still is seised thereof as aforesaid; that both the said William Warren Baldwin and the now plaintiff, from the said 1st day of January, in the year of our Lord 1833, resided and continued to reside in the Home District—the said William Warren Baldwin from thence until the time of his death as

aforesaid, and the now plaintiff from the day and year last aforesaid and from thence hitherto; that the following statements of account so far as they go, numbered respectively 1, 2, 3, 4, are true copies of the same statements which so far as they go were made out by the said William Warren Baldwin in his lifetime in respect of the taxes payable upon the lands therein mentioned, and the several sums set forth respectively opposite to each of the said lots, were and are the true sums of money due and payable upon the said respective lots of land as the taxes thereon; that the charges for per centage made in each of the said accounts against the said William Warren Baldwin, were made by the said Francis Thomas Billings as the treasurer of the Home District, for his per centage on the receipt by him of the sums of money in the said lists contained, for the taxes due upon lands situate without the Home District, and among lands upon Lot 22, in the first Concession of Plantagenet; that the receipts written at the end of each of the said accounts are true copies of the respective receipts given and signed by the said Francis Thomas Billings as treasurer of the Home District, to the said late William Warren Baldwin, on the days they severally bear date, and the statements in the same contained are true; that all taxes due and chargeable upon the said Lot No. 22, in the first Concession of Plantagenet, from the said 1st day of January, in the year of our Lord 1833, to and until the 1st day of January, in the year of our Lord 1843, had been paid by the said William Warren Baldwin in his lifetime, to the said Francis Thomas Billings as the treasurer of the Home District under the statute in that case provided; that the following are the copies of the statements of account before referred to, numbered 1, 2, 3, 4, and of the receipts thereunder written, shewing the manner in which the various entries were made:

(1)

District.	No. of Lot.	Con.	Township.	Acres.	Years.	Amount of Taxes.
Home	S. ½ 6 S. ½ 7	4	Reach.	200	3	£0 16 8
"	1	6	"	200	3	0 16 8
Ottawa	22	1	Plantagenet.	200	4	1 8 10½
(And so on to the end of the schedule.)						£84 7 6½
Treasurer's per cent						1 15 7½
						£86 3 2

Received of Dr. Baldwin the assessment and road tax on the within mentioned lands, amounting to 86*l.* 3*s.* 2*d.* currency.

(Signed) F. T. Billings,

City of Toronto, April 4, 1834. *Treasurer, H. D.*

(2)

St. George's Estate Land Tax List, to 1st July, 1836.

District.	No. of Lot.	Con.	Township.	Acres.	Years.	Amount of Taxes.
Home.....	S. ½ 6 / S. ½ 7	4	Reach.	200	3	£ 0 16 8
"	1	6	"	200		0 16 8
Ottawa.....	22	1	Plantagenet.	200		0 16 8
(And so on to the end of the schedule.)						
						£32 1 10½
Treasurer's Commission on remit.....						1 12 0
						33 13 10½
						42 1 9½
						£75 15 8

Received of Dr. Baldwin the assessment taxes on the within lands to 1st July, 1836, amounting to 75*l.* 15*s* 8*d.*

Toronto, June 5, 1837. (Signed), F. T. Billings.

(3)

Received by the hands of W. W. Baldwin the assessment taxes on the undermentioned lands, for the estate of the late Mr. St. George, three years, to 1st July, 1839:

Home District.—South halves of 6 & 7 in 4th con. Reach, 200 acres.
1 in 6th con. do. 200 "
Ottawa District.—Lot 22, in 1st con. Plantagenet, 200, 16*s.* 3*d.*
(And so on to the end of the schedule.

Total 3900.....	£54 9 8
	15 17 4
Commission on £30 13*s.* 11*d.*.....	1 10 7
Amounting to 71*l.* 17*s.* 7*d.*	£71 17 7

(Signed), F. T. Billings.

Toronto, 20th August, 1840.

(4)

Tax List for the Lands of the Estate of Mr. St. George, up to

District.	No. of Lot.	Con.	Township.	Acres.	Years.	Amount of Taxes.	Obser'.
Home.	N. ½ 59 / S. ½ 60	1	Markham.	95 / 95	3½	£ 0 9 0 / 0 9 0	
Ottawa.....	22	1	Plantagent.	200		0 19 0	
(And so on to the end of the schedule.)							
						£ 6 18 0	Including
Commission						0 8 0	lands in
						42 18 1	Amaranth.
						£49 14 1	

Received of Dr. Baldwin the assessment and road tax on the within mentioned lots, amounting to 49*l.* 14*s.* 1*d.*—period from 1st July, 1839, to 31st December, 1842, inclusive.

£49 14s. 1d. (Signed),

Toronto, 22nd July, 1842. F. T. Billings, *T. H. D.*

That the books of account or entries of the payment of the taxes on the land in Plantagenet aforesaid, are believed to be in the possession of the said F. T. Billings, who ceased to be treasurer of the Home District sometime on or about the year of our Lord 1843; that the treasurer of the Ottawa District, has not received since the 1st of July, 1835, from the said F. T. Billings as such treasurer of the Home District, nor from any one else (until the payment hereinafter mentioned made by the plaintiff to the defendant) the amount of the aforesaid payments so made upon and in respect of the assessments and taxes due upon the said land in Plantagenet; that according to the books and accounts of the treasurer of the Ottawa District, there appeared on the 1st of July 1843, an arrear for taxes and assessments due upon the same land in Plantagenet, of eight years, amounting to or about the sum of 3*l.* 13*s.* 3*d.*; and after a due notice of the intended sale of the same lands to satisfy the said arrears, the same land was, on the 10th day of June 1844, sold to satisfy the said arrears, that on the 17th day of February, 1845, the now plaintiff, having heard of the sale of the land, in Plantagenet, by his agent, wrote to the defendant for information respecting the same, which letter the defendant on the 1st March thereafter answered, acquainting the plaintiff of the sale of the same land on the 10th day of June, 1844, for 8 years' arrears of taxes from the 1st of July, 1835, to the 1st of July, 1843, and advising the plaintiff in the same letter, "to transmit to the defendant the amount of the re-"demption money 4*l.* 7*s.* 10*d.*, before the expiration of the year from "the said 10th day of June, 1844, in order that the error or omission "might be effectually corrected;" that on the 13th day of May, in the year of our Lord 1845, the plaintiff by his agent wrote a letter to the defendant in reply to the defendant's letter aforesaid of date the 1st of March, 1845, of which letter of the plaintiff to the defendant the following is a true copy:—

"TORONTO, 13th May, 1845.

"Sir,—I would have replied to your letter at an earlier period, but was desir-"ous of awaiting the return of my brother, who, as the heir at law of my father, "is the legal owner of the lot in question, though merely as trustee for Mr. St. "George, and of taking his instructions respecting the course to be adopted "respecting it.

"I enclose you copies of Mr. Billings' receipts for the taxes on this lot, for "the whole of the period for the supposed arrears of which it has according to "your letter been sold, except for the half of the last of the year in 1843, leaving "out all that part of the documents which refer to other lands, and am ready, "if you desire it, to give you an exact copy of the whole, and to afford you any "other reasonable satisfaction as to payment of these taxes which you may "require.

"As you however insist that notwithstanding the payment of these taxes to "Mr. Billings as treasurer of the Home District under an authority of an act of

"parliament, your district cannot be the looser by his not having remitted "the amount to you, I herewith, *but under protest*, transmit you the amount of "redemption money claimed by your letter, viz., 4*l.* 7*s.* 10*d.*, in order to prevent "the conveyance of the lot to a stranger. You will distinctly understand, that "I transmit this money under pressure as well of what is considered to have "been an illegal sale of the lot in question, as of your letter insisting on the "payment of the money to save the conveyance of the lot, and that the trustee "will pursue such remedy for the recovery of the money, which has thus been "a second time paid, as may be open to him either at law or in equity.

"I have the honour to be, Sir, your obedient servant.

"(Signed) W. A. BALDWIN.

"THOS. H. JOHNSON, Esq.,
"Treasurer, Ottawa District."

That the defendant answered the last mentioned letter, by writing one to the said agent of the plaintiff, of which the following is a true copy :—

"Treasurer's Office, L'Orignal, 20th May, 1845.

"Sir,—I am duly in the receipt of your letter of the 13th instant, covering a "cheque for 4*l.* 7*s.* 10*d.* Cy., being the amount required, to redeem Lot No. 22, "in the First Concession of the Township of Plantagenet, and for its due redemp- "tion consider this a sufficient voucher.

"I note what you say with regard to your legal course, and have only to say, "that if I have made an error in the matter I am responsible to make it right; "but if Mr. Billings received the money and neglected to transmit it to me, it "is a matter between yourself and the executors, and I have nothing to do with "it.

"I have the honour to be, Sir, your most obedient servant.

"Signed,) T. H. JOHNSON.

"W. A. BALDWIN, Esq., Toronto.

That all of the statements contained in the aforesaid letters be received as admitted facts in this case; that this action was commenced on the 14th day of July, in the year of our Lord 1845, after the payment of the money in question in this cause; that the sum in question which the plaintiff claims from the defendant is 4*l.* 7*s.* 10*d.* The question for the opinion of this honorable court is, whether the plaintiff, or the late William Warren Baldwin, who paid the taxes as aforesaid to the said Francis T. Billings as treasurer of the Home District, on Lot No. 22, in the first Concession of Plantagenet, for and on behalf of the treasurer of the Ottawa District, was obliged to see that those payments were transmitted by the said Francis T. Billings to the treasurer of the Ottawa District, and received by the said treasurer of the Ottawa Dtstrict, or not? And whether the plaintiff can recover from the defendant the said sum of 4*l.* 7*s.* 10*d.*, as money had and received by the defendant, to the plaintiff's use, the same sum having been paid by the plaintiff and received by the defendant under a protest against the plaintiff's liability to pay the same, and it having been made by the

plaintiff under compulsion to save his inheritance? Or otherwise under the circumstances of the case? And whether the plaintiff can sue for the same in his individual character, supposing the same to have been received to the use of his ancestors? And if this honorable court shall be of opinion that the plaintiff, or the said William Warren Baldwin, was not bound to see to the application of the same payment so made as aforesaid to the said Francis T. Billings, as treasurer of the Home District, for and on behalf of the treasurer of the Ottawa District, and that the plaintiff can recover from the defendant the said sum of 4*l.* 7*s.* 10*d.*, as money had and received under the aforesaid circumstances by the defendant to the use of the plaintiff, then that a judgment shall be entered for the plaintiff by confession or otherwise, as this honorable court shall think fit, against the defendant for the said sum of 4*l.* 17*s.* 10*d.* damages; but if otherwise, that judgment be entered for the defendant against the plaintiff of *nolle prosequi*, or as this honorable court shall direct.

Adam Wilson, for plaintiff.

H. Eccles, for defendant.

ROBINSON, C. J.—This case is drawn up with much care, and presents the points clearly and precisely to the judgment of the court. The main question arising upon the facts stated is an important one, viz., whether a person by paying the taxes due upon his lands to the treasurer of the district in which he resides, under the statute 9 Geo. 4, ch. 3, the land being situated in another district, is by such payment, secured against the lands being liable to be sold for arrears of taxes, although the treasurer who received the money from him, shall have neglected to transmit to the treasurer or the district in which the lands lie.

It is not stated in the case, whether the treasurer of the Ottawa District, in which the lands are, did or did not know of the taxes having been paid in the Home District, when he returned them as being in arrear. That he had not received the money is all that is admitted, but as the act directs that the money shall be transmitted with the accounts, it should be inferred I suppose, in the absence of any statement to the contrary, that as the taxes were not paid over, no account of their payment had been furnished, and that the lands were sold in ignorance that the apparent arrears had been in fact discharged, so far as the payment of the money to the treasurer of the foreign district could be a discharge.

The next question which the case presents is, whether this plaintiff can, under the circumstances, maintain this action, for money had and received, whatever may seem to be the legal consequence of the payment to the treasurer of the Home District, upon the validity of the sale.

We have given much consideration to the first question, and I believe my brothers as well as myself, are prepared to express an opinion upon it, if it were necessary to the determination of this case, but as it does not appear to be so, we think it better to abstain. It is an important question, and one that we apprehend may be raised in many cases, and it seems therefore desirable that it should be left to be determined without prejudice when it shall arise, as it may in some case, involving larger interests, and when the attention of the parties and their counsel may be drawn more exclusively to it from the fact of the case turning wholly upon it. Our judgment proceeds, at present, entirely on the last point. It is our opinion that the plaintiff cannot recover back the money which he has paid to the defendant, in the manner and under the circumstances stated. When he learned that the land had been sold, and within the period allowed for redemption, he resolved to take such steps as appeared necessary for saving the land. If by reason of the payment which he made to the treasurer of the Home District before the sale, the land was discharged and the sale must be held invalid, then, of course, he was under no legal compulsion to pay the assessments a second time. But declining, and prudently, perhaps, to rely upon that, he determined to do whatever he might find necessary for saving the land. If at any time before the sale, the plaintiff learning that the money had not been remitted, had informed the sheriff of the fact of his having paid it to the treasurer of another district, that would not have warranted the sheriff in forbearing to sell, or at least would not have made it his duty to do so, and so also when within the year after the sale, he went or applied to the treasurer of District of Ottawa and gave him the information, the latter conceived, and as I think, rightly, that he could not discharge the land, and therefore could give him no release till he actually received the money. The 3rd clause of the 9th Geo. 4, ch. 23, makes that clear, as I think. Then under these circumstances, and with a full knowledge of all the facts, the plaintiff pays to the defendant the sum necessary for redeeming his land, telling him, at the same time, that he pays it under protest, in order to prevent the conveyance of the lot to a stranger, and under the pressure occasioned by the sale, though he conceived it to be illegal, reserving to himself to pursue such remedy as he might think proper for getting back his money. The defendant was not moving in the matter, he did not exact

the payment from the plaintiff, any further than by making him aware upon his application, that he could not discharge the land till the taxes were actually paid into his hands, whether by the plaintiff or by the treasurer of the Home District was immaterial to him. He therefore took the money when it was offered to him, observing that if he had made an error in the matter he was responsible to make it right, but that if Mr. Billings (the treasurer of the Home District) had received the money and neglected to transmit it, it was a matter between the plaintiff and Mr. Billings, with which he (the defendant) had nothing to do. It is very clear that up to that time the defendant had committed no error. He could not avoid returning the land as in arrear, for it was so according to the express provisions of the law; all that was done afterwards, was done by others, not by him, and done legally in obedience to the statute. The plaintiff, when he learned what the fact was, had his option either to see that Mr. Billings remitted the taxes which he had received, or to pay them himself in the first instance, since they must at all events be paid before the land could be credited, and then to take his remedy against Mr. Billings. He took the latter course of paying the money himself, and having done so he cannot, in our opinion, turn round upon the defendant, and sue for the money back again.

It would be contrary, we think, to well settled principles of law, to hold that this defendant, a public officer, receiving a sum of money legally under such circumstances, can be burthened with an action to force out of his hands, a payment voluntarily made to him, (as we hold this to have been) with knowledge of all the facts. And the accompanying the payment with a protest, which the defendant could not prevent, and had nothing to do with, could not give a right of action. I refer to the cases of *Knibbs* v. *Hall*, 1 Esp. N. P. C. 84, and *Brown* v. *McKinally*, Ib. 279. In the latter of these cases there was, it is true, an objection to the recovery which does not apply here. An action had been brought against Brown, by McKinally, upon which the latter had paid the money, but as in this case under protest, and then he brought an action to recover it back. The court said he should have resisted the demand in the first suit if he meant to dispute it at all. The same principle applies to the present case, for there was no judgment in the former action. It was merely a demand made by action, and voluntarily acquiesced in. And there are many cases in which the money was paid as it was here, without an action, in which the plaintiff's right to recover has been denied, when there has been neither fraud, nor mistake of facts, nor duress. If the plaintiff had neither paid the money himself

nor procured the other treasurer to pay it, the only consequence would have been that the sheriff would have made a deed to the purchaser, the land not being redeemed; and then it would have been for the plaintiff to contend that the lands were discharged of the tax by the first payment, that the foundation of the sale was wanting, and therefore that his estate could not be taken from him on the ground of a forfeiture which was not incurred. Rather than trust the matter upon that issue, the plaintiff exercised his discretion, and paid the money himself to this defendant, who merely received it because the plaintiff chose to pay it. It cannot be said here, as was said by Littledale, J., in *Morgan* v. *Palmer*, 2 B. & C. 739, "that the plaintiff was merely passive and submitted "to pay the sum claimed." On the contrary, he offered it to the other who received it, and who moreover was not only entitled to receive it but bound to receive when offered.

What do the facts of this case amount to more than this? The plaintiff's lands stand charged with a tax, from which they cannot be discharged until a certain sum of money is actually paid into the defendant's hands; he knowing all the facts, and the defendant having done nothing wrong and demanding nothing, the plaintiff pays a sum of money into his hands, when the defendant does no wrong in receiving at his request. Surely no authority can be shewn which will support the plaintiff in turning immediately round upon the defendant and suing for the money back. The defendant held nothing of the plaintiff's in his hands, and had exacted nothing; he had indeed nothing more to do after the sale than to receive the redemption money from any one who chose to pay it.

Nonsuit to be entered.

PETERS v. LONDON BOARD OF POLICE.

Where a Corporation is empowered by statute to enact bye laws, and to impose a penalty for their infraction, not exceeding a certain amount, a by-law is bad, which annexes a penalty to an offence but does not declare its amount.

The Corporation of the Town of London has power to make a by-law prohibiting the sale of butcher's meat within certain hours, except at the public market.

(Q. B., H. T., 9 Vic.)

Appeal from the District Court of the London District, on a judgment on demurrer in favour of the plaintiff.

Replevin. The defendant avers, that before the said time when, &c., by a certain act of parliament of that part of the province of Canada

formerly called Upper Canada, passed in the third year of the reign of our Sovereign Lady the Queen, entitled an act to define the limits of the town of London in the district of London, and to establish a Board of Police therein, it was amongst other things enacted that it should and might be lawful for the said Corporation from time to time to establish such ordinances, by-laws and regulations as they might think reasonable in the said town; and also, that if any person should transgress the orders made by the said Corporation under the authority of the said act, such person should for every such offence forfeit the sum which in every such order, rule or regulation shall be specified, with costs, to be recovered by information before the said Corporation, to be levied of the goods and chattels of the said offender. And the said defendants further say, that after the passing of the said act, and according to the form of the statute in that behalf, and before the said time when, &c., to wit, on the 24th day of February, in the year of our Lord 1845, it was amongst other by-laws and regulations enacted and published according to the form of the statute in that behalf, by the President and Board of Police of London aforesaid, that no person or persons should sell or expose for sale in the town of London aforesaid, any butcher's meat, corn, wheat, peas, barley, oats, flour, meal, bran or shorts, vegetables, apples, pears, peaches, melons, plums, butter, cheese, eggs, lard, tallow, poultry, game, farm stock or other animals, whether alive or dead, fish, hay, straw, boards, scantling, staves, shingles or lath, excepting rafts delivered on the river's bank, at any other place than the public market; provided always, that nothing in that by-law should be taken to prevent persons from selling any or all of the articles above mentioned after market hours, if they had stood in and paid the market fees on that day, and had been unable to dispose of them in the public market; and that persons so offending should be liable to be fined in the discretion of the Board, and the fees to the clerk of the market; and the defendants further say, that afterwards, to wit, on the 26th day of July, in the year of our Lord 1845, the plaintiff, within the limits of the town of London, did sell and expose for sale butcher's meat between the hours of six o'clock in the morning and two o'clock in the afternoon, being the established market hours, without having first stood in and paid the market fees thereof, or offered the same for sale in the market, contrary to the by-law and regulation above recited; and thereupon the said plaintiff was, upon the information of one Ezekiel Whittemore, duly made within fifteen days after the committal of the said offence, to wit, on the 28th day of July now last past, duly summoned to appear before the said President and Board of Police of London; and the said plain-

tiff did not appear to answer to the said offence so then and there charged against him, and thereupon upon due proof of the committal of the said offence, was convicted by the said President and Board of Police of London, and fined in the sum of 1*l.* 10*s.* and costs, as it was lawful for them to do in that behalf. And the said President and Board of Police of London, afterwards to wit, on the 25th day of August, in the year of our Lord, 1845, at London in the said district upon and by virtue of the said conviction, sealed and executed their certain warrant, directed to one Peter McCarne, then and still being constable or bailiff for the said President and Board of Police, authorising and requiring him to levy of the goods and chattels, of the said plaintiff the sum of 1*l.* 10*s.*, being the amount of the said fine, and also 6*s.* 9*d.*, being the costs of the said warrant and the summons and proceedings, besides his own fees on the warrant, and to proceed to the sale thereof, giving eight days' notice at least of such sale, returning the overplus, if any, to the plaintiff, and what he should have done therein to make known to the said President and Board of Police of London, on the 8th day of September then next, which said warrant, afterwards, to wit, on the said 25th day of August was delivered to the said Peter McCarne, as such constable, on behalf of the said President and Board of Police of London, in due form of law to be executed; and the said Peter McCarne, as such constable or bailiff of the said President and Board of Police of London, seized and took the cart, goods and chattels of the plaintiff, for the purpose of levying thereon the said fine, costs of warrant and bailiff's fees, and kept and detained the same in his possession, doing no unnecessary damage to the said plaintiff for the cause aforesaid; and so the said President and Board of Police of London well avowed the taking of the said goods and chattels of the plaintiff, and justly, &c., as due for a levy of the said fine and costs so due as aforesaid, and which still remains due and unpaid, and this the defendants are ready to verify, &c., wherefore they pray judgment and a return of the said goods, and chattels, together with their damages, according to the form of the statute in such case made and provided, to be adjudged to them, &c.

To this avowry the plaintiff demurred generally, and the points marked for argument were, that the defendants had no power or authority to make or pass the by-law under which they avow, and that the statute does not give them the authority they assume and set forth, and that therefore they cannot justify under the circumstances.

Upon this demurrer, judgment was given for the plaintiff in the court below, and the defendants having appealed from that judgment, the case was argued on appeal by

J. Wilson, of London, for the appellants, and

Blake, for the respondent.

ROBINSON, C. J.—I am of opinion that the by-law set out in these pleadings is one which the Corporation had power to make, so far as it goes to prohibit the vending butchers' meat within market hours, at any other place than within the public market, but I think the by-law bad in this respect, that it does not annex a specific penalty to the offence, as the 23rd clause of the act requires, but leaves the amount of the penalty within the discretion of the Board in each case, of conviction, and without even limiting them to imposing a fine not exceeding 30*s.*, which the statute requires shall be the limit in regard to all penalties. The opinion of this court is required only upon the validity of the by-law. For the reason which I have given I consider it bad, and that therefore the plaintiff is entitled to judgment.

Upon the principal question, whether the Corporation has power to make regulations requiring butchers' meat to be sold only in the market within certain hours, I do not think that power can be denied to them. Having authority to fix the *days* and *hours* for selling butchers' meat, that gives them authority to provide that it shall not be sold within certain hours except in the market, because they could clearly restrain its being sold at all within those hours in the town; and the only question would be, whether under the power given, such a by-law as this, qualified as it is, would be so unreasonable as to be bad. The Corporation has besides, by the concluding words of the 21st clause, not merely authority to fix upon such days and hours as they may think fit, for the purpose of selling butchers' meat in the town of London, but also "to "make such other orders and regulations relative thereto, as they shall "deem expedient." This is a power so comprehensive as to be bounded only (in regard to the objects specified) by the obvious restrictions, that they can enact nothing repugnant to the statutes of the province; and admitting that with respect to a power thus delegated by the legislature; its exercise must, like the legislative power of ordinary chartered corporations, be restrained within such bounds as courts of justice may pronounce reasonable, still we should have difficulty in declaring the object of such a regulation as that in question to be unreasonable.

We must have respect to what the legislature of this province has been in the habit of doing in other cases, and to the use which has always been openly and notoriously made of the power of regulation which they have conferred in other instances in regard to the same matter; and we know, that so far from its being looked upon as being un-

reasonable, it has been the constant practice where markets exists, to prohibit the selling of butcher's meat and some other articles of provision, except at the market, within certain hours. It is felt to be for the common convenience of the inhabitants of a town, that such regulations should be made.

There seems to be an omission in regard to this town of any recognition of a certain market, or any appointment of one, or any express power to establish one, although the 11th clause assumes that a market house is to be built.

I infer from the case stated and the arguments, that there is in fact a market, though how it has been established is not stated; and my opinion that the Corporation can confine the sale of butcher's meat to the market within certain hours, is predicated on the supposition that there is a market to which the regulation can be applied.

MACAULAY, J.—I am of opinion that the respondent is entitled to judgment upon the defect in the by-law in relation to the penalty. Upon the power of the Corporation to make the by-law, I am not prepared to give any judgment.

JONES, J., and MCLEAN, J., concurred with the Chief Justice.

Judgment confirmed with costs.

It is provided by the consolidated statutes U. C. cap. 54, sec. 274, that the Council of every City, Town, and Incorporated Village, may respectively pass by-laws for the following, among other purposes, (6) for establishing markets, (7) for regulating all markets established and to be established, (8) for preventing or regulating the sale by retail in the public streets of any meat, vegetables, fruit, beverages, (10) for regulating the *place* and *manner* of selling and weighing butcher's meat, fresh hay, straw, fodder, wood, and lumber. Section 248, No. 6, authorizes the Council to pass by-laws for inflicting reasonable fines and penalties, not exceeding $50 and costs, for non-performance of duties by corporation officers and for breaches of by-laws.

DARBY v. EARL.

Under the Common School Act 7 Vic. [illegible] the trustees of any school district might make a valid [illegible] teacher of the school for the district, to give him [illegible] for such school district for the year w[illegible] if the [illegible] served for only three

(Q. B., H. T., 9 Vic.)

[illegible] mus nisi issued from [illegible] dant, and commanding [illegible] on schools named in the [illegible] intendent of common schools

for the City of Toronto, directing him to pay to this plaintiff the sum of 82*l.* 0*s.* 5½*d.*, being the balance coming to the plaintiff of the school fund apportioned for the school district number ten in the said city, as the school teacher for that district. (*a*) The writ was grounded on an alleged contract set forth in the recital, as being made by the trustees, whereby they agreed to pay to this plaintiff, as such school teacher, "*during the "continuance of his office, the whole of the public allowance which "should be apportioned to the said school*, besides certain other rates "and allowances;" and the grievance complained of was, that although the trustees contracted with the plaintiff on 1st August, 1844, upon those terms to teach the school, and although he continued to teach from that time till after the close of that year: and although under the provisions of the school act, the sum of 104*l.* 10*s.* 5½*d.* was duly apportioned as the public allowance for the said district for the year 1844, and came into the hands of the city superintendent to be so applied: and although the city superintendent, during a delay which occurred in making the apportionment, paid to the plaintiff 22*l.* 10*s.* on account of the said public allowance, yet that this defendant refused afterwards to join with the other trustees in making an order upon the city superintendent to pay him 82*l.* 0*s.* 5½*d.*, being the balance of the said public allowance, as appeared when the same was afterwards ascertained; by reason whereof the plaintiff was prevented from receiving the money due to him upon his contract. The object of the writ was, to compel the defendant to join the other trustees in making such an order, or to shew cause why he did not. The defendant made a return to the writ, denying that the trustees had made any such contract with the plaintiff as he alleged, but that on the contrary, it was expressly agreed that he was to receive for his services during the year 1844, only such an amount of the aggregate school fund to be apportioned to the school district number ten, for the year 1844, as should be proportionate to the period of his teaching, together with the whole of such monthly dues as should be collected from the scholars attending the school during that period.

And for this sum the defendant stated he had been always ready to give the plaintiff an order upon the city superintendent from the time that the amount could be ascertained. The plaintiff complained of this return to the mandamus as false, affirming that the trustees did

(*a*) The system of schools for cities was altered by the statutes 10 & 11 Vic. 19 and 18 & 14 Vic. c. 48, now consolidated in the Consolidated Act for U. C. 4. All the schools of each city are now managed by one Board of School ıtees, possessing more extensive powers than those formerly enjoyed by ·es of school districts.

make such contract with him as that set out in the mandamus; and that they did not contract with him in manner and form stated in the defendant's return.

Upon the trial of this issue, the jury found for the plaintiff, giving him a verdict for the amount claimed as the balance remaining in the city superintendent's hands, of the public allowance for common schools apportioned under the statute 7 Vic. ch. 29, to district number ten, for the year 1844.

The Solicitor General moved to arrest the judgment, on the ground that no valid contract, such as the plaintiff alleged, could have been made by the school trustees; that it would have been contrary to the statute, and illegal upon the face of it, and therefore such as this court ought not by their judgment to carry into effect.

Baldwin shewed cause.

ROBINSON, C. J.—The question is one wholly between the plaintiff and the trustees; or, rather between the plaintiff and this defendant, as one of the trustees, for the others do not seem to have objected to the payment, and it is the opposition of the defendant alone that has created the difficulty. The money is in the meantime in the city superintendent's hands, to be drawn out upon the order of the trustees, whenever they may concur in giving it.

To determine whether if the trustees did really make the contract which the plaintiff alleges, and which *we must now* (since the verdict), assume they did make, such contract would be illegal and void, it has been necessary for us to look carefully into all the provisions of the statute 7 Vic. ch. 29.

According to these provisions, supposing all to have been done which the act directs, and confined as we are upon this motion to the record, we have no grounds for imagining the contrary, then the following are the steps which we must suppose have been taken. On or soon after 1st March, 1844, the superintendent must have apportioned the school money of each township, city, &c., assigning to the city of Toronto its portion; on 1st August, 1844, such money must have been paid to the *county superintendent:* (*a*) the county superintendent must have given notice forthwith (that is directly after the 1st August, 1844,) to the city superintendent, of the amount for the city in his hands, and must have

(*a*) All school moneys are now paid into the hands of the chamberlain or treasurer, and checked out by the Board of School Trustees. See Consolidated Act for Upper Canada, c. 64, s. 123 and s. 79, No. 13. In counties, the moneys are paid into the hands of the county treasurer, and by him to sub-treasurers, and are subject to the order of the local superintendent of each township.

held the same subject to the city superintendent's order: he must also have sent *at the same time* to the city clerk notice of the sum assigned to the city: the city clerk must at once have laid that information before the city council, and they must *without delay* have assessed at least an equal sum, through the city collector, to be paid by him to the city superintendent of common schools; the city council must also have appointed a city superintendent of schools for the city, who may have divided the city into school districts and applied for the school money, and fixed the proportions to be paid to each, (*a*) for he is not to apportion the allowance alone of the aggregate *school fund*, that is, of the public allowance and the rate; and the city superintendent must, within twenty days after forming the school districts, have appointed a time in each for a district school meeting: at such meeting the trustees must have been chosen, who might at once "contract with and employ teachers," and who might draw from the *city superintendent* the amounts due them for their salaries, "so far as the *monies in his hands applicable to their* "*district shall be sufficient for that purpose*," and who might *collect* and pay over the salary: that is if the public allowance and the sum assessed should not be as much as they had contracted to give to the teacher, they might levy the deficiency from the parents of the children taught. The condition that a school shall be kept in the school district for at least three months, to entitle the trustees to receive the public allowance, cannot, I think, be applied to the first year, 1844. The 19th, 25th, and 68th clauses sufficiently shew that. But if it could, the condition appears in this case, by the statements in the record, to have been complied with. On receiving notice of the sum which the chief superintendent had allotted to the City of Toronto, the city superintendent should at once have informed the city council, as we must suppose he did, of the sum allotted for their schools, and the city council should then have forthwith levied by assessment at least an equal sum, which being paid by the collector into the hands of the superintendent would form part of the school fund; the other part, namely, the allotted portion from the provincial revenue, remaining in the hands of the county superintendent, subject to the order of the city superintendent. Both these amounts, when received, would form in the hands of the city superintendent the *aggregate school fund*, which school fund (and not

(*a*) The board of school trustees in each city, town and village, now appoints the local superintendent and determines the amount of the school fund of the municipality payable to teachers. The school divisions are determined by the municipal wards. In townships, the municipality has power to form school sections.

the allowance alone,) he is to apportion among the several districts, according to the number of children between five and sixteen years of age, residing within the division. (*a*) Now for all that appears before us in these pleadings, the statute has been regularly acted upon, and a school fund formed for district number ten, being the aggregate of the public allowance for this district, and of the rates levied to be added to it; and the plaintiff was engaged as teacher by the trustees for that district, not for any definite period of service, and has actually served from August, 1844, to the end of the year; and the trustees did, as is stated in the record, contract to pay him, "during the continuance of his office, "the whole of the public allowance which should be apportioned to that "school district, besides certain other rates and allowances." Waiving any question as to "the other rates and allowances," about which no difficulty has arisen, the plaintiff claims under this contract 104*l.* 10*s.*, being the whole of the public allowance paid in 1844, as the school money for the district number ten, for that year. And the questions are, first, what does the agreement as set out by the plaintiff really import? and secondly, is the agreement, according to what we must hold to be its import, a legal agreement by which the trustees are bound; or, is it illegal and void as being contrary to the statute, and one which the trustees could not lawfully make? The defendants evidently understand and admit that such a contract as the plaintiff had set out would assure to him that which he claims, namely, the whole allowance *for the year*. They put the same construction as he does on the words of the contract which he sets out. For my own part I have been strongly inclined to doubt whether that would be the fair effect of the words. The contract, as the plaintiff himself states it, is not that the trustees were to pay him the whole public allowance *for the year* 1844, or "for the year," but that "*during his continuance in office they would pay him the whole "public allowance apportioned to his district;* not the allowance apportioned for the year. And the first question we have to ask ourselves is, whether this really means anything more than that for the period of his service they would pay him *the whole public allowance*, that is, the pub-

(*a*) This mode of apportionment is now altered. The Consolidated Act for Upper Canada, c. 64, relating to Common Schools, provides (section 91, No. 1) that the Local Superintendent of each township shall apportion the school fund to the school sections, according to the rates of average attendance of pupils at each common school, as compared with the whole average number of pupils attending the common schools of the township. The system of school operations in cities, towns and villages, is different from that in townships, and the rule above given may or may not apply to such, in the discretion of the board of school trustees.

lic allowance received for that period, paying him *pro rata;* as for instance, if a salary of 100*l.* per annum were by act of parliament attached to a particular office, and on the 1st July a person should be appointed to such office, and he should serve to the 1st January following, if he were then to receive 50*l.*, he would receive the whole public salary allotted to the situation *during his continuance in office.* He does not in that case receive the whole salary *for the year*; but this contract, as the plaintiff sets it out in his declaration, does not express that the plaintiff is to receive the whole allowance for 1844, or for the year, but that, "*during his continuance in office, he should receive the whole of the "public allowance which should be apportioned to the said school district.*" I have had a good deal of doubt whether, consistent with the language used, the plaintiff's contract, as he himself states it, would assure to him anything more than a full proportion of the public allowance, during his period of service, taking 104*l.* 10*s.* as the money for the year, in other words the whole public allowance during the period of his service and if that were the construction which we must give to the agreement on which he himself relies, then the return which these defendants have made to the mandamus would be the same in effect, though in different words, and would not be a false return on which he could ground a right of action, and the plaintiff would be claiming under the agreement set out a sum to which he would not be entitled. But both plaintiff and defendants seem clearly to admit and understand that the contract according to which the plaintiff claims, would cover the whole 104*l.* 10*s.*; and my brothers, I believe, take the same view of the legal construction of the words used. It is perhaps the more natural and sound one. "The whole of the public allowance *which shall be apportioned to the "district*" may well have been meant to extend to the whole specific sum allotted by the chief superintendent, which would be the 104*l.* 10*s.*, and both parties have seemed to admit that if such were the words used, that would be their effect. As my brothers are also of that opinion, it is of no moment to dwell further on the doubt which I have had on that point. Now admitting (as the jury have found), that such an agreement was made, would it be illegal and invalid? At first view it would seem to be an unreasonable agreement, unjust towards the public, and inconsistent with the spirit of the act, for the contract set out does not make it a condition that he should serve for any certain period, and such a system would afford no assurance that the service and compensation should bear a just proportion to each other. But though it might be an unreasonable and incautious contract for the trustees to make, it does not of course follow that it must be invalid under the act, and still

less that we have any arbitrary discretion to pronounce it void. The best security against injury to the public would have been in the trustees being furnished under the 6th clause of the act, with a suitable form of contract and suitable instructions or regulations for their guidance. When we come to consider, which I have done very carefully, all the provisions of this statute, reading them over repeatedly in order to discover their connection and effect, I do not feel that we have authority to say that the trustees, under the very general power given to them by the 44th section to make contracts with the teachers, could not legally engage to give to any one of them the whole public allowance and the whole of the rates for that particular district, without requiring that he must serve the whole year. It would be absurd, I think, and wrong to do so, or at least to promise him the allowance without making it a condition that he should serve some certain period, and without guarding against the contingency of the teacher ceasing to serve during the year, or for such a portion of it as they might consent to accept as sufficient. The statute seems to admit of a claim to the whole allowance being founded on a service of three months, or any period above that, if the trustees shall consent. The contract set out here did not bind the teacher to any certain term of service, but it is averred on the record, and not denied, that he did in fact serve from the 1st August to the end of the year, which was as large a portion of the year as he could well have served, allowing for the time at which the act could be brought into operation; that for such a service he could not legally receive by agreement with the trustees the whole of the public allowance for 1844, considering that it embraced all that part of the year in which a school could be taught under the act, and also extended beyond three months, is what I think we can on no very clear ground hold; though to have made such a contract, even under the very general authority given to the trustees, might be imprudent and improper. The power given to the trustees by the 44th clause of the act, to contract with and employ teachers, is very general in its terms, and we have no authority to place it within restrictions which the legislature has not prescribed. As the trustees seem not to have had the means of knowing, when they made the contract, what amount of money would fall to their district in the general apportionment throughout the province, it is not improbable that they believed they might safely engage to pay to this teacher the whole allowance, and that it would form no extravagant recompense. There can be no doubt that the proper and just mode of proceeding would be to assure a certain sum according to the period of service; but we can neither make any law to that effect, nor do we find in the

statute that the trustees were placed under any actual legal necessity for entering into that description of contract. And as we cannot on any legal principle hold that the contract under which the plaintiff claims is void, admitting it to assure to him for only five months' service, the whole allowance for the year, we are of opinion that the rule for arresting the judgment must be discharged.

Rule discharged.

GRANTHAM V. THE CITY OF TORONTO.

Where an inhabitant of a corporate town being overrated, pays the overrate to the collector, without at the time making any remonstrance, he cannot afterwards recover back such rate, in an action for money had and received.

Semble—If he *voluntarily* pays the overrate, even though protesting at the time of payment, he cannot recover it back.

(Q. B., T. T., 10 Vic.)

This action was brought on the common count, for money had and received.

Plea, *non-assumpsit*.

Upon these pleadings, the following statement of facts was agreed upon and submitted to the consideration of the court:

1st. That this is an action brought by the plaintiff, who is at present, and for many years has been, a livery stable keeper in the City of Toronto, and during such occupation has, since the year 1840, owned the usual property and appendages to a livery establishment, including horses, waggons, carriages, cutters, gigs and various other property, and which were during that time used and let by the said plaintiff for hire and reward in the city of Toronto and liberties thereof, in the usual course of his business as a livery-stable keeper as aforesaid; to determine the right of the city of Toronto to rate, assess, levy and collect the several rates, taxes and assessments on the above-mentioned property, as if the same were used for *pleasure* only. 2nd. Whether the city of Toronto can collect any taxes or rates on such property, in any other manner than by exacting a fee for a license? 3rd. For the recovery of monies paid at various times since the year 1840, by the plaintiff to the defendants, for city rates and assessments levied and collected on the above-mentioned property, under the circumstances hereinafter stated.

2nd. That there has been no statute or by-law passed by the corporation of the city of Toronto, nor is there any by-law made or passed by the city of Toronto, licensing livery-stables, in accordance with the 68th clause of the act of incorporation.

3rd. That the assessors of the city of Toronto, have from time to time since the year of our Lord, 1840, assessed the said livery-stable and establishment of the plaintiff, including horses, waggons, carriages, cutters, gigs and various other property, and which were during that time used and let by the said plaintiff for hire and reward in the city of Toronto and the liberties thereof, in the usual course of his business as such livery-stable keeper as aforesaid; and that the said property was respectively assessed in the same manner as other articles of the same kind used for pleasure only, as mentioned in the eleventh section of the amended act of incorporation passed the 4th March, in the year of our Lord, 1837.

4th. That the said assessments were respectively collected, demanded and received by the collectors under their usual authority, and were treated by them as any other of the city assessments; that they had the general power of distress as referred to in the act of incorporation in case of non-payment of rates or assessments, and that they had the same power of distress in this case as in other cases of city rates and assessments in case payment was refused; and that the collectors acted under the usual authority of "The City of Toronto," and collected and paid over the monies hereinafter mentioned to the proper officer appointed to receive them; and that all such monies were placed in the city funds, and were made use of for city purposes; and that the plaintiff at the time such monies were paid, did not know but that these rates were legally and regularly imposed and collected.

5th. That the sums assessed and paid as aforesaid, were regularly mentioned in the particulars of the plaintiff's demands attached hereto, and as mentioned in the collector's receipts.

6th. That in the year 1845, the rates amounted to 22*l.* 5*s.*, which amount the plaintiff refused to pay, on the grounds above in the first statement mentioned; that he was threatened with distress in case of his continued refusal, but that the amount was subsequently reduced to 3*l.* 3*s.* 8*d.*, which was paid under protest, and this action was immediately afterwards commenced; the said reduction was made by the court of appeal, under the 13th section of the amended act of incorporation, on an appeal made by the plaintiff in the usual form.

7th. That at the time such rates were demanded, the plaintiff paid them without refusal, except the last payment, and under the impression that the corporation had a right and the power to collect them; and they were paid without any distress warrant having been issued.

If the court shall be of opinion that the plaintiff was legally liable to such rates, and was legally obliged to pay them, and that they were legally

and regularly imposed or collected, and that the plaintiff is not entitled to recover on the above statement of facts in this form of action, then a verdict to be entered for the defendants; and that execution in either case be issued, as if a verdict had been taken; and that in case it shall become necessary to have this cause referred for revision or decision by a court of error, this statement may be turned into a special verdict or otherwise, by consent of counsel.

If the court shall be of opinion that, on the above statement of facts, and the pleadings in this cause, and on the construction of several acts of incorporation, that the plaintiff was not legally liable to those rates, and was not legally obliged to pay, and that the payments were not voluntary in a legal sense, and that they were not legally and regularly imposed or collected, then a verdict to be entered for the plaintiff for the sum of 71*l.* 10*s.* H. o'y, provided also that the court is of opinion that interest, under the hereinbefore-mentioned circumstances of the case, and under the declaration herein contained, can be allowed; but if not, then for the sum of 59*l.* 5*s.* 6*d.*

D. G. Miller, counsel for the plaintiff.

Cameron, Sol.-Gen., and *J. Lukin Robinson*, for the defendants.

ROBINSON, C. J.—The first question presented is upon the liability of the different descriptions of property to taxation, under the facts stated. This part of the case seems to me free from doubt. We must take it wholly upon the statute 7 Will. IV. ch. 39, sections 8 & 11, and it is clear, that for whatever horses were kept by him, the plaintiff was liable to be assessed, as all other inhabitants of the city were, and without reference to the purposes for which he may have kept them.

It is equally clear, that for his carriages, gigs, sleighs, and every vehicle of that description, he was not liable to be assessed, except in regard to such of them as he was keeping "for pleasure only." The words of the statute are explicit.

The only points that admit of argument are:—

1st. Whether, the plaintiff can recover back any money which he has unnecessarily paid, or been improperly made to pay (as he contends), on account of rates assessed upon his carriages not kept for pleasure; or whether he is not precluded, first, by omitting to appeal, as the act directs; or, secondly, upon the principles which govern the action for money, had and received, when brought under such circumstances.

1st. With regard to the obligation upon the plaintiff to pursue his remedy by appeal against the rate; the appeal given by the 18th clause

of 7 Will. IV., ch. 39, is confined obviously to the case of alleged overcharges made by assessors in the value put by them on real property under the 9th clause. And the same court which is to decide upon such appeals has also a jurisdiction conferred upon it under the 16th clause, in respect to the exempting from assessments unoccupied buildings, and granting relief to persons unable, from poverty, &c., to pay the rate, which jurisdiction is not properly applicable here.

If this plaintiff had at any time resolved to contend against his liability to rates, either in respect to his horses or carriages, I do not see clearly that his remedy was by appeal, and that he can be held to have waived any other remedy by not appealing.

The only ground that really seems to admit of discussion, is whether the plaintiff can be said to have paid voluntarily such taxes as he has paid with a full knowledge of the facts, and whether, in that case, he can recover the money back in this action.

As it is stated in the case that this action is brought to try the right: it would seem to be rather inconsistent with this intention to rely upon any objection against being liable to refund the money, if the question of right should be determined against the defendants: but it is, I see, expressly submitted by the case, as a point to be adjudged by us, whether the payments were or were not voluntary in a legal sense, and this must therefore be decided.

As nothing is said in the statute 7 Will. IV., ch. 87, to the contrary, I think we are to assume that the assessors for the city are to obtain an account of the ratable property possessed by each householder, in the same manner as is done under the general assessment laws, that is, by calling upon the owner to give in a list; and the inference, in the absence of any statement to the contrary, is that the plaintiff, Grantham, had himself stated in former years the number of horses kept by him, and for which he was accordingly assessed. It is not shewn that he did at any time, either when giving in the list, or before paying, or at the time of paying the rates now claimed to be recovered back, give any information to the collector or assessor, or to the corporation, that there was any certain number of his carriages which were not kept by him for pleasure, and on that ground not liable to be taxed; nor is it shewn that the corporation or their officers received the rates with the knowledge that any portion of them had been paid in respect to such carriages. The plaintiff himself must have well known how the fact was, and if the assessor did not obtain from him the list of the carriages, but took upon himself to set down the number, still it is clear by that law the plaintiff had full opportunity of knowing for how many carriages he

had in fact been rated for, and of objecting (as it was incumbent on him to do), if he found himself assessed for more than he ought to have been. Instead of this he paid the rates as assessed, without remonstrance or objection, and now after the lapse of some years, brings his action to recover back all that he unnecessarily submitted to pay. In the meantime we must suppose the corporation must in the ordinary course of things have applied the money received by them in each year to public purposes; and it would be most unreasonable to hold them liable to an action to recover back what has been thus expended, having been received under such circumstances. It is unreasonable to contend that the plaintiff paid the rate under compulsion, for the just presumption is, that if the plaintiff had made the defendants aware of the fact, nothing more would have been exacted than was right. If this action could lie, then it must follow that whenever an inhabitant of the city has been assessed for property which he did not own, or for more than he owned, and has paid the tax without objection, he can harass the corporation with an action to recover it back again. Both parties in this case were equally bound to know the law: the defendants were certainly not bound to know what use the plaintiff made of his carriages. The plaintiff of course knew which were liable to be taxed, as being kept for pleasure, and which were not; and what he, with this knowledge of the fact, consented to pay, the collector was warranted in receiving; the plaintiff might as well bring an action upon the ground, that four years ago he paid a tax upon four horses, when he owned only three. The defendants could not be expected to have it in their power to protect themselves against such actions, by proving what the fact really was, especially after years had elapsed.

If, when the several payments were made, the plaintiff had stated the facts, and insisted that he was not liable to the extent claimed, but had nevertheless paid the money because it was demanded, then the question of voluntary payment, with the cases decided upon it, must have been carefully considered by us. It is my impresssion, that this not being a case of extortion or fraud, the money could not have been recovered back even under such circumstances. The language of the courts have varied, but I believe the cases of *Bilbie* v. *Lumley et al* (2 E. R. 469), and of *Brisbane* v. *Dacres* (5 Taunt. 145), are still regarded as having being correctly decided, and they are strongly in point against this action. The case of *Baldwin* v. *Johnson*, in our own court (2 Cam. 475), bears also upon this question.

I am of opinion that, upon the facts stated, the defendants are entitled to a verdict.

MACAULAY, J.—The plaintiff was clearly *overrated*. From overcharge the statute gives an appeal. It is silent as to overrating. Being thus overrated in respect of the number of his carriages kept "for pleasure only," the plaintiff, being called on, paid the rates without objection or remonstrance. He had full knowledge of the facts, and though mistaken in law, his conduct shews a tacit acquiesence in the correctness of the rate. He should have remonstrated at first; for, if actions like this are tenable, any number of persons accidently overrated, may pay the rates without saying a word, and then bring actions for money had and received. It is too late.

JONES, J., concurred.

Verdict to be entered for the defendants.

O'HARA v. FOLEY.

A person passing a toll-gate more than once on the same day, could not, while the statute 3 Vic. ch. 53, was in force, be legally charged more than one toll in the twenty-four hours.

(Q. B., T. T., 10 Vic.)

The plaintiff declared on the common count, for money had and received.

The defendant pleaded the general issue.

It was agreed between the counsel for the above-named plaintiff and defendant, that a verdict be taken for the above-named defendant, subject to the opinion of the court on the following case. It is admitted:

1st. That the servant of the plaintiff, on the 18th day of November, 1845, with a waggon and a pair of horses drawing the same, passed through Toll-gate No. 1, on Dundas Street, at which gate the defendant was the gate keeper, and paid the toll of nine-pence, and returned on the same day through the same gate with the same waggon and horses.

2nd. That on the said 18th day of November, 1845, when the same waggon and horses, the plaintiff's servant a second time passed through the defendant's gate, when the defendant demanded the payment of nine pence as toll, which the plaintiff's servant was obliged to and did pay, under protest. That the same fact occurred between the same parties at the same place, on the 7th day of February following. That this action was commenced within the three months mentioned in the statute after the said 18th day of November. That the table of rates upon

which are painted the tolls payable at Toll-gate No. 1, on Dundas Street, amongst other tolls authorizes the toll-gate keeper to take and exact for every waggon drawn by two horses the sum of nine-pence, and that such sum was authorized to be taken on the aforesaid 18th November, 1845, and 7th February 1846.

That if the court should be of opinion that the exaction of the said second tolls on each or either of the said days was legal, the said verdict is to be entered for the defendant; if of a contrary opinion, a verdict to be entered for the plaintiff, and the court to draw all inferences, &c.

R. P. Crooks, counsel for plaintiff.

J. Lukin Robinson, for defendant.

ROBINSON, C. J.—I do not perceive in the statutes passed, respecting that particular road in question, any existing provision on the subject of tolls which can affect the point submitted to us. It must turn then upon the enactments of the general act for regulating turnpike trusts, 3 Vic. c. 53, and on what has been done under it. The 25th, 28th, 29th 30th and 40th clauses appear to be the only clauses of that statute which require to be considered. Our attention has not been called to any more recent statute that can affect the question, and we are not aware of any.

The 25th section authorizes the commissioners to continue to demand and receive the tolls which were at the time of that act passing directed to be taken and collected by any act passed for making and maintaining the macadamized roads.

With respect to what has been done under any prior act, towards imposing tolls, all that we are told in the case is, that "the table of rates "on which are painted the tolls payable at the toll-gate in question, "amongst other tolls, authorizes the toll-gate *to take and exact for every "waggon drawn by two horses, the sum of nine-pence,*" and that such sum was authorized to be taken by statute 3 Will. IV. ch. 37, s. 9,—which clause has been repealed by 3 Vic. ch. 53.

Whether that statute provided that such toll should be taken upon every waggon, &c. as often as it passed through the gate, or imposed the toll precisely in the words here given, is not stated; but I find it was silent on the subject.

Under the same 25th clause, the commissioners have power given to them to reduce or increase the previous tolls,—which power they have not exercised in regard to this gate No. 1, but have left the toll to stand, as stated in the case.

Now the 28th clause of this Act, 3 Vic. ch. 53, enacts, that it shall

be lawful for the collector of the tolls *to be taken by virtue of that act*, (which I take clearly to include those tolls, because though previously established, they are now received by virtue of this act, and not under the one repealed by it,) "*to demand and take every day* (such day for the "purposes of this act, being computed from 12 o'clock at night, to 12 "o'clock at the next succeeding night,) the several tolls directed to be "taken at the several toll-gates, &c., and which tolls or sums of money "shall be demanded and taken as aforesaid, before any horses, cattle, or "carriage whatsoever, shall be permitted to pass through any toll-gate," &c.

And it is upon the effect of this clause that the question turns; for if the commissioners or the trustees, under the former acts, could have made any express regulation that would not have been controlled by the operation of this clause, expressing whether the tolls should or should not be exacted more than once in the day from the same waggon and horses passing through the same gate, it is not shewn that they have made any regulation of that kind.

We are left then to declare our sense of the construction of this clause; and we do not see it in the 20th, 30th, or 40th clauses, or elsewhere in the act, anything that can warrant us in giving to this 28th clause a different construction from that which it should receive, if it stood alone.

Our opinion is, that the 28th clause imposes the toll of nine-pence upon every waggon drawn by two horses for using the gate during each day, and not for every time that it goes through the gate in the course of such day.

The act is faulty, in not being more explicit in this respect, as the English turnpike acts usually are,—some of which allow the party only to return free during the same day that he has paid, and others allowing him to pass free during the day for an unlimited number of times after having paid once.

The collectors are to take tolls every day; that is, every day that the team goes through, they are to take ninepence.—the day is described as extending from midnight of one day to midnight of the next,—which provision, as well as all that is said in the clause respecting the day, would be insensible, if the intention was to impose the toll as often as the waggon should go through.

The concluding part of the clause is not repugnant to this construction; it merely, in effect, enjoins that every day in which any waggon, &c., shall pass through the gate, the toll shall be paid before it shall be allowed to go through.

This is complied with by exacting the toll on the first occasion of its passing,—when it comes a second time, it has no toll to pay.

There is, doubtless, force in the argument, that the toll is fixed as a reasonable compensation for the use of the road, for the benefit received, and the injury done to the highway, and therefore that there is no injustice in exacting the toll as often as the waggon passes.

Perhaps in this case the legislature meant nothing less; though the person framing the act may have inadvertently copied in this part the language of some English statute, which in another part of such statute provided that the toll should be levied but once in the day,—upon which point this act contains nothing express, while the clause (28th) which it does contain, is reconcileable (so far as it goes) with no other construction than that which we feel ourselves compelled to give it.

We must take our act altogether as it stands. We consider that the collector can only demand under it, one toll in the twenty-four hours from the same waggon,—any other construction would make those wo ds which declare how the day shall be reckoned, useless and inapplicable for any purpose whatever; and we cannot reject the construction which seems to us the only natural and reasonable one, upon the idea that it would be a construction intolerably or unreasonably injurious to the public, because we find the fact to be, that in turnpikes in England (where they have been long familiar with them), the payment of tolls is often placed by law upon precisely that footing, and by language so clear as to leave no room for doubt.

The act for the Honiton turnpike, in England, 47 Geo. III., upon which the case of *Loaring* v. *Stone* 2 B, & C., 515, arose was one of that kind; and even went further, for it makes a payment at any one gate sufficient to pass the same waggon, during the same day, through all the other gates on the same road. And such provisions are very general in the English acts.

If the legislature, in passing the 3 Vic. ch. 53, did really not mean what we think the clause imports, it will be easy to make the act so explicit as to leave nothing to be taken by surmise or intendment; and such precision is necessary, for as was observed by the court, in *Waterhouse* v. *Keen*, 4 B. & C. 200, "Acts of Parliament, such as those now "in question, must be construed with reference to the particular language "in which they are expressed; but when there is any ambiguity in the "language used, the construction must be in favor of the public, because "it is a general rule, that when the public are to be charged with a "burden, the intention of the Legislature to impose that burden must "be explicitly and distinctly shewn."

My opinion is, that the plaintiff is entitled to a verdict upon the case stated.

MACAULAY, J.—It is a result not probably contemplated by the legislature, nor does it appear to me a very reasonable one, but the cases are emphatic that statutes such as these, are to be construed strictly in favor of the public or payer, and that the person using the road is not to be charged with double toll, or twice on the same day, unless *clearly* made liable thereto. It is not clear in this case, and I do not therefore feel authorized to uphold the exaction, although if a double toll had been distinctly directed to be taken by the commissioners before the statute 3 Vic. c. 53, it might have been confirmed by that act in ss. 25, and 37.

The toll is not for passing the gate, but as compensation for using the road; and the act only strictly authorizes one toll for one day's use.

JONES, J., concurred.

Verdict to be entered for the plaintiff.

CAMPBELL v. ELLIOT ET AL.

A county superintendent of common schools, signing together with the trustees a contract with a teacher, will be considered to have signed the same only as approving the appointment, and in pursuance of the direction of the statute and not as a party contracting with the teacher.

(Q. B., T. T. 10 Vic.)

The plaintiff sued in assumpsit on a special agreement by the defendants, to employ the plaintiff "as teacher and master of a school, for a "year from 1st July, 1845, at a certain salary, to wit, 166*l.* 5*s.* for the "year."

The declaration averred that the plaintiff did enter into the employment of the defendants as such teacher, on the terms aforesaid, and continued to serve the defendants therein, as such teacher, &c., till the 19th September, 1845, when the defendants wrongfully discharged him, without any reasonable or probable cause whatsoever, and refused to employ him for the remainder of the term, or to pay him his wages for such period.

The declaration also contained a count for work and labour as a schoolmaster, in teaching a school for the defendants, and counts for money had and received, and an account stated.

The defendant Elliot, pleaded 1st, *non-assumpsit*.

2ndly. To the first count, that the school mentioned therein was a county model school for the District of London, according to the statute,

of which the other three defendants were trustees; and they appointed the plaintiff teacher for one year, subject to the provisions of the statute, with the special approval of him, the defendant Elliot, who then was, and still is, the county superintendent of common schools for the said District of London; and that the said defendant Elliot, as such superintendant, afterwards, viz., on the 18th September, 1845, "*considered* "*it was necessary to dismiss, and did then actually dismiss*, the plain- "tiff, as such teacher of the said model school, as it was lawful for him "to do under and by virtue of the said statute," of which the plaintiff had notice, which is the said non-performance complained of. The plea was demurred to.

The other defendants, Black, Moore and Southwick, pleaded to the first count the general issue.

2ndly. To the second and third counts, except to 27*l.* 6*s.*, parcel, &c., they pleaded *non-assumpsit*; and as to the 27*l.* 6*s.*, a tender before action brought, and payment into court; and a set-off to the whole action.

The plaintiff replied to the tender, damage beyond the 27*l.* 6*s.*, which he took out of court.

The case was tried at the last moment of the assizes for the District of London, upon a record made up by consent, and entered a few hours before the trial, and the jury gave a verdict for the plaintiff, 132*l.* 15*s.*

The plaintiff had, on the third day of the assizes, served the defendant's attorney with a notice to produce the written agreement or memorandum on which the plaintiff was engaged to teach for the year; no paper was produced by the defendants on the trial, and their counsel objected that the notice was served too late. The plaintiff was allowed to give secondary evidence of the agreement, which was in substance, that the plaintiff was to keep the county model school, (for the County of Middlesex), at a salary of 166*l.* 6*s.* per annum, and that his engagement should be for the term of one year, beginning on the 1st of July then next (1845).

There was a paper put in, which the plaintiff's attorney swore he was satisfied was a copy of the agreement or memorandum intended for heads of an agreement which was drawn up between the parties when the contract was made. The plaintiff entered upon his duty as teacher under the contract, and taught from the 1st July to the 18th September following, when he was dismissed.

The salary due to him to that day, according to the contract, was tendered and refused, and this action was brought to recover damages, for not retaining him in service, but wrongfully dismissing him.

The paper which was produced at the trial as a copy of the agreement, but not admitted to be such, and the production of which was objected to after stating the terms, concludes thus: "It is understood "that Mr. Campbell's engagement shall be for the term of one year, "beginning on the 1st of July next;" and it professes to give the signatures, thus:

(Signed) "DUNCAN CAMPBELL, H. Mr.
"MR. NOTT, Assistant.
"DR. SOUTHWICK.
"MR. BLACK.
"MR. MOORE.
"MR. ELLIOT.

Elliot was in fact the school superintendent for the county, and he contended that he had signed the paper in no other capacity but merely to signify his approval, as the School Act required.—7 Vic. ch. 29, s. 61.

The learned judge, when the case had gone through, left it to the jury to find for the plaintiff, if they were satisfied that all the defendants signed the agreement as contracting parties, but not otherwise; and on that direction, they found for the plaintiff, giving him damages, as it appears, to the amount of the wages which would have been payable to him, under the agreement, if he had been allowed to serve out the whole of his year.

J. H. Hugarty, counsel for the defendants, now moved to set aside the verdict without costs, as being contrary to law and evidence and misdirection, and for admission of improper evidence, and for excessive damages; and in support of his motion, produced Elliot's affidavit, in which he swore positively that the contract was made by all the parties under the School Act, having that before them at the time, and that he signed, and was known by the plaintiff to sign, as superintendent only, and with no other intention than to signify his approval of the engagement made by the trustees which the act required him to do; and also annexed to this affidavit a paper which Elliot swore was a copy of the memorandum, in pencil, made at the time, and subscribed by the parties in the same form as that was subscribed.

This paper agreed with the paper which was produced, except as to the manner in which the signatures were given, thus:

"DUNCAN CAMPBELL, Hd. Master.
"ELIAS C. NOTT, Assistant.
"WM. ELLIOT, Dist Superintendent.
"HENRY BLACK,
"MARTIAL T. MOORE,
"G. SOUTHWICK,
} Trustees."

Blake and *Beecher* shewed cause, contending that the defendants had waived all objections as to time of serving notice, by having delayed pleading till the evening of the day before the assizes terminated.

ROBINSON, C. J.—The case certainly, in my opinion, calls for a new trial. Taking only the evidence which the jury had before them, it was not reasonable to suppose that Elliot signed otherwise than as superintendent (*a*). This plaintiff had been some time before teaching a school under the act, and must be supposed to be cognizant of all its provisions, and to have intended to make the contract under it. There is no ground for supposing that the plaintiff expected to be remunerated otherwise than out of the public funds; and through the operation of that system which the legislature had established. The paper which was given in at the trial as secondary evidence of the agreement, could not be relied upon by any one as an accurate transcript of the signatures, for it was manifestly not a copy of the agreement, but merely a memorandum shewing by what persons it was subscribed. It does not give the christian names of the parties signing, but merely "signed, Dr. Southwick, Mr. Elliot," &c., giving no additions, either to the trustees or to the superintendent. According to the paper which is now put in, annexed to Mr. Elliot's affidavit, the parties did in fact sign very differently, both as to the order in which they set their names, and the additions which they appended to them. This plaintiff, in making the engagement, doubtless looked to the public funds for his salary, and not to the private responsibilities of the parties; and I cannot for a moment imagine that he considered the trustees to be acting in any other manner than as trustees, or that Elliot was or would have been a party to the transaction in any other manner than in virtue of his office as superintendent. If Elliot had produced, at the trial, the paper which he has annexed to his affidavit, the jury would hardly have come to any other conclusion, than that the contract was made under the statute, and by the trustees alone on the one side, and Campbell on the other side; though the district school was inconveniently mixed up with the model school in the arrangement.

If, having that paper before them, the jury had found the verdict which they did, I must have considered the defendants entitled to a new trial, without costs; and as it is, I have difficulty in determining that they should not have it on those terms, because the plaintiff must have known

(*a*) The 61st section of the School Act referred to, provided that it should not be competent for the trustees of any school constituted as a county model school to appoint any person to be a teacher in the same, unless with the especial approval in writing of the county superintendent, &c.

that the paper which he placed before the jury, as a copy of the agreement, did not represent truly the manner in which the parties had signed. But, on the other hand, the defendant Elliot who was present at the trial, had it in his power to shew all that he shews now. It is not asserted by him, that he had not the paper with him in court; but it seems he declined to bring it forward, relying, as I suppose, that the plaintiff, for want of notice to produce the agreement being served in time, would be found not entitled to give secondary evidence; and being unwilling to help him through the difficulty, by producing this copy, which he now advances in aid of the application for a new trial.

I am of opinion, under all the circumstances, that the verdict should be set aside, and a new trial granted on payment of costs.

The question of Elliot being or not being a contracting party, affects the whole verdict; for if the contract was in reality made by the trustees only, the misjoinder of Elliot, as a contractor, is a fatal variance (*a*).

MACAULAY, J.—The verdict is warranted by the evidence given at the trial of this cause, but the copy of the agreement now produced imports, that Mr. Elliot signed only as superintendent, and not as a contracting party. The statute authorizes the trustees to engage teachers with his approbation; and as the damages are large, I have no objection to a new trial on payment of costs. The issue is, whether the defendants jointly contracted or not; and the question does not arise, whether the superintendent could dismiss the plaintiff of his own discretion, without assigning any cause; if it did, it is not clear to me that he could do so, after signing the engagement by which the parties agreed to abide by the arrangement therein contained, the last item of which was, that the plaintiff was engaged for a year.

The 7th Vic. ch. 29, s. 61, empowers the trustees to appoint the teacher with the approval of the superintendent in writing; and it gives him *power* at any time to *suspend* or dismiss such teacher, if he shall consider it necessary to do so; but it does not follow that he can exercise such power without *any cause*. Without such authority, he could not have dismissed at all. The trustees had power to dismiss for adequate and justifiable cause; and as to them the statute is silent, but seems to confer a like *power* on the superintendent. Nor has he such power, except in relation to the model school, by sec. 33, No. 2; and the trustees are to contract with and employ all teachers within the

(*a*) As to misjoinder of defendants, and the amendment thereof, see the Consolidated C. L. P. Act, cap. 22. sec. 68, p. 200 Such amendment must be made at or before the trial, *Robson* v. *Doyle*, 3 E. & B. 396. See also the notes to Harrison's C. L. P. Acts, pp. 141-142.

same. But in case he specially agrees to abide by the agreement to hire the plaintiff for a year (*a*).

JONES, J., concurred.

Rule absolute, on payment of costs.

LONDON BOARD OF POLICE v. TALBOT.

A., upon being appointed clerk to the market of the Board of Police of London, enters into a bond for the payment of a certain sum of money in compensation for the market tolls, which the Board allowed him to receive. Being sued on his bond for non-payment of the money, he pleads, "that he discovered, after "the execution of the bond, that the plaintiffs had no legal authority to erect "a market, or make by-laws respecting fees to be taken thereat;" he then avers that they had no such authority, and that on this account the bond is void.

Held. **plea bad in not shewing that no market was erected, or existed, and in not averring that fees were not in fact received by him.**

Quære? **Does the act 3 Vic. ch. 31, give the Board of Police of London power to establish and regulate a market, and appoint fees to be taken thereat?**

(Q. B., T. T., 10 Vic.)

Declaration. Debt on bond, which appeared on oyer to be conditioned that the defendant should pay to the plaintiff certain sums of money, provided the plaintiff should at all times uphold and enforce the several bye-laws of the said president and board of police, made or thereafter to be made, relating to the collection of market fees, and all other things appertaining to the office of clerk of the market, by trial, conviction, distress or otherwise, so that the said John Talbot shall not be injured or damnified by reason of the refusal or neglect of any person or persons required by the said bye-laws to pay, or otherwise, the said sum of 173*l.* 8*s.* 3½*d.*, being in lieu of all fees payable to the said president and board of police, and also if the said John Talbot, during the said period, that is to say, between the day of the date of the above-written obligation and the fourth day of March next, shall and do well and truly perform and keep and execute the several duties appertaining to the office of the clerk of the market, and shall do, observe, perform and keep, and enforce the several by-laws, rules, orders, and regulations, which are now or may be passed for the regulation of such public market.

(*a*) The act 16 Vic. cap. 185, sec. 15 (Cons. Stat. c. 64, s. 87), provided that hereafter no action should be brought into any court of law or equity to enforce any claim or demand between trustees and teachers under the School Acts, but that the same should be referred to and decided by arbitration. See *Tiernan* v. *School Trustees Nepean*, 14 U. C. Q. B. 15. The trustees of each locality are now constituted a corporation.—Consolidated Stat. U. C., chap. 64, p. 732. As to township model schools see same Act, sec. 82, p. 737.

The defendant pleaded as his defence, "that prior to the execution of "the said supposed bond, the president and board of police of London, "pretending a right to erect a market in the said town of London, and to "enact bye-laws regulating the same, and establish certain tolls, fees and "dues appurtenant to the said market, and claiming right further to "appoint a certain officer, to wit, the clerk of the said market, with power "to collect such tolls, fees and dues, did propose to the said defendant "to become the clerk of the said market, upon the terms in the condi- "tion of the supposed writing obligatory mentioned, and thereupon the "defendant, believing that the plaintiffs had power to erect such market, "and to establish tolls, dues, and fees to be paid to the Clerk of the same "did agree to accept such office, upon the terms aforesaid, and did, at "the request of the plaintiffs, execute the said supposed bond; but the "defendant discovered that the plaintiffs had not any legal authority, or "any charter from the crown, to erect a market or to make bye-laws, "rules, orders or regulations respecting the fees to be taken thereat, and "the defendant averred that the president and board of police of London "had not at the time of the execution of the aforesaid bond, nor have "they at any time since acquired any legal authority, or any charter from "the crown authorising them to erect a market or to make bye-laws, "rules, orders or regulations respecting the fees to be taken thereat, "whereupon the said bond was and is wholly void, and this the defen- "dant is ready to verify, &c.

Demurrer to first plea, not sufficient in law.

W. H. Blake, against the demurrer (*a*).—The question to be decided upon this demurrer is, whether the defendant is estopped by his bond from denying the recital it contains, viz.—that the board of police of London has authority to establish a market in the town of London, and to impose fees to be taken thereat? It is submitted that the defendant cannot be held estopped from urging such a defence. Has the board of police legally the power, under the act 3 Vic., ch. 31, to erect a market in the town of London, and to exact tolls? he would contend they had not. The principle is well established, that before a corporate body can impose tolls, which are a burden upon the public, they must be able to point to clear and precise language in the act of parliament authorizing the very toll sought to be exacted. *O'Hara* v. *Foley*, in our court (ante p. 48) was decided upon this principle. Now does the act 3 Vic. c. 31, incorporating the town of London, contain specific language upon the right

(*a*) This demurrer was argued in the order as above, it having been intimated by that mistake that Mr. Blake had abandoned the plea.

to erect a market and demand toll such as is here contended for? No such construction can fairly be put upon any of its clauses: on the contrary, it will be found materially to differ in its terms from other acts incorporating other towns, where the right has been unequivocally conferred. Why, then, was not a similar clause, as express in its terms, inserted in this act? The legislature must for some reason have designedly omitted such clauses in the London act. Assuming therefore, that the act 3 Vic. ch. 31, conferred no right upon the board of police in London to erect a market and appoint tolls to be taken thereat, was not the bond executed by the defendant upon the assertion that such a right existed, an illegal bond? and if an illegal bond, a plea denying the condition to be legal would, it is submitted, be a good plea. The law will not allow an estoppel to work in favor of an illegal act.—6 Vesey, 776; 6 Bing. N. C. 34; 10 B. &. C. 826.

Cameron, Sol. Gen., for the demurrer.—There may not be language in the act incorporating the town of London (3 Vic. ch 31), as expressly conferring upon the board of police there the right to build a market and take tolls, as in other acts incorporating other towns; but it is submitted that the act does contain clauses evidently relating to the establishment of a market in London, and does in general words, which is all that can be required, authorize the passing of a by-law by the board of police with respect to the imposition of market toll. The 9th clause says expressly "that they may raise funds for building a market-house, "and may make such by-laws as they may think reasonable for the "improvement, good order and government of the town, not repugnant "to the laws of the province" This demurrer however, must, it is submitted, be determined upon grounds wholly independent of the view the court may take upon the general question of the right of the board to impose market toll. It is perfectly consistent with all that is stated in the plea, that the board may have in fact, whether legally or not erected a market and imposed fees to be there taken: the plea does not aver that no market was erected, or that fees were not in fact received by the defendant; and how can the defendant, after admitting the plaintiff's title in his plea, and deriving, as it must be assumed he has done, all the benefits of his appointment, under the plaintiff's authority, question the legal right of the board to do what they have done. If the defendant had found, when entering upon his office, that he was obstructed in collecting his fees, he had his proper remedy; but while admitting that he has received the fees—as his plea must be held to do —it would be contrary to all law to allow him to dispute the right under which the board had been acting; the defendant, reaping all the benefit

stipulated for in his bond, cannot resist payment of the consideration money upon which such benefit was conferred.

ROBINSON, C. J.—The defendant having obtained from the plaintiffs the office of clerk of the market of the town of London, for a year from the 4th of March, 1845, has given a bond with surety to the plaintiffs for the due performance of the duties, and also for payment of a certain sum in compensation for the market tolls which he was to be allowed to receive. Being sued upon this bond, for the non-payment of the money due under it, he pleads that he discovered, after the execution of the bond, that the plaintiffs had no legal authority, or charter from the crown, to erect a market, or make by-laws respecting fees to be taken thereat, and denying that they had any such authority, he pleads that the bond is on this account void. As regards the assertion that the plaintiffs had no charter from the crown for erecting a *market*, the plaintiffs, by demurring, must be taken to admit that to be true; but if the plaintiffs had otherwise by law, that is by any statute which we must judicially notice, a right to erect a market, then the defendant must fail upon the demurrer. Upon that point, I think, there is much room for doubt. There is certainly nothing so express in the statute incorporating the board of police of London, respecting the establishment of a market, as there is in the other statutes of that nature regarding other towns; but I have not made up my mind that the corporation of London have not the power, under the act, to establish and regulate a market, and appoint fees to be taken. The act 3 Vic., ch. 31, gives the board power (sec. 9) to make such laws for the internal government of the town as to them shall seem meet, to appoint such officers as shall be required for the due execution of them, and take security from them. They may *raise funds for building a market-house*; may make such by-laws as they may think reasonable for the improvement, good order, and government of the town, not repugnant to the laws of the province. They may "fix upon and appoint such days and hours for the purpose "of selling butchers' meat, butter, eggs, poultry, fish and vegetables, "and make such other orders and regulations relative thereto, as they "shall think expedient."

These are very extensive powers given to them, and evidently having relation to the establishment of a market, at least for the sale of the articles enumerated. I should have difficulty in saying that the board had no authority under them to establish a market in some particular part of the town, and to impose tolls and fees. It is true that tolls or other impositions upon the subject must rest upon some clear and precise authority, and consequently if any tolls are to be collected at a market

in London, there must at least be shewn some express by-law of the board authorizing the toll in precise terms; but I cannot go so far as to say that the power to make such a by-law cannot be conferred by the legislature in general terms, but that the words market fees or market tolls must be used, and authority given to impose them.

The statute 31 Geo. III., ch. 31, which constituted the legislature of Upper Canada, gave it power to make laws for the peace, welfare and good government of the province; and under that general authority it has always been understood and admitted that they might impose taxes and duties, and authorise fees, though no specific words are used in the statute giving power to pass such laws more than others. Still the law of England is so scrupulous in regard to the authority upon which acts of this nature must rest, that unquestionably it was an omission not to provide in the act establishing the board of police of London, in express words for the establishment and regulation of a market, and the imposing of tolls, and it will be prudent to have that omission supplied without delay. What I have said upon it was not necessary for determining this demurrer, because I think the plea bad upon grounds independent of the general question. The defendant sets up as his defence that the plaintiffs, pretending a right to erect a market and to appoint a clerk to collect fees, &c, proposed to him to become the clerk. We cannot tell from this whether he means us to understand that they acted upon their pretensions or not, for it is consistent with all that is said in the plea that the board may never have proceeded to establish a market or to appoint fees, but may have left the defendant to pay his money without doing anything towards enabling him to receive the fees which were to form the emolument of his office, and on the other hand it is equally consistent with what is stated in the plea, to infer that the plaintiffs may have set up a market and established fees, and that the defendant may have collected and received them under their authority; and now, after having availed himself of their regulations and of his appointment, and received all the benefit of it, he may be endeavouring to evade payment of his bond, by questioning their legal right to do what they have done. This would be contrary to all legal principles. If the fact were that the defendant, after entering on his office, found his claim to fees contested, and was obstructed in the receipt of them, then his plain remedy was under the condition of the bond. He should have called on the board to enforce them by law, and if they failed to do so, then by the very terms of the condition, he would be exempt from paying. But as the plea does not exclude the supposition that he may in fact have received all the bene-

fits he stipulated for, I am of opinion that it is bad, and that judgment must be for the plaintiffs on demurrer.

MACAULAY, J.—The plea does not distinctly aver that the plaintiffs did erect a market, only that prior to the execution of the bond, not saying how long prior, the plaintiffs, pretending right to erect a market and to establish tolls and fees and to appoint officers, proposed to defendant, not saying when, to become clerk of the said market; that he accepted the office and gave the bond, and then avers that after the execution of the bond (not saying how soon after, and it may have been after the year had expired, and he had received all the fees and emoluments as clerk of a market then existing, during the whole period) he discovered that they had no legal authority or charter to erect a market, &c., at the time the bond was executed, nor since had they any such authority or charter, &c. He does not say no market was erected, or existed, or any fees received. It is consistent with all that is stated, that in point of fact there was a market, and fees imposed, as mentioned in the bond, and the plaintiffs long in possession thereof as ostensibly entitled. It is not competent to the defendant, after admitting their title under the statute, and reaping the fruits of the appointment, to dispute their title. If the plaintiffs have usurped powers that do not belong to them, in claiming a franchise such as a market is, with tolls and fees, &c., the mode of proceeding is by information *quo warranto*, or some other course that shall deny and resist their pretensions, and not one that acknowledges the right and shews not that it was impeached by any regular proceeding. Whether the plaintiffs can, by virtue of the act 3 Vic., ch. 31, erect a market, or have done so, or whether they may do so if a site has been reserved or dedicated by the crown for that purpose by force of the 9th, 11th and 21st sections; or whether they can legally impose tolls or fees by their own bye-laws, is not by any means clear to me, though it was no doubt contemplated by the legislature in passing the act. I do not think the plea shews the absence of any market, or the usurpation of powers not belonging to the plaintiffs in relation to the market mentioned in the bond, so as to render it void on the ground of illegality. The right and title is admitted by the defendant, and he seems estopped from disputing it, after having received the benefit; it would be a different thing if he showed disturbance, or a total failure in the condition, owing to the plaintiffs having made an appointment, and guaranteed tolls and fees they had no legal right to dispose of. If there be a market, in fact, of which they have the possession and control (as I think must be intended), I do not see that a bond securing a sum upon

farming the office of clerk to such market is illegal and void, so long as the market exists, and the benefit of the office is enjoyed without disturbance or obstruction. I do not look upon it as illegal (however unauthorized) so as to invalidate the bond. The defendant is estopped from denying the right.

JONES, J., concurred.

Per Cur.—Judgment for the plaintiffs on demurrer.

IVES ET AL. v. CALVIN.

The provincial act 9 Vic., ch. 9, as well as the common law, authorise a person to make use of his own boat, *within the limits of a ferry*, in the pursuit of his business or pleasure, freely and without any necessity of shewing the particular motives or occasions he may have for allowing any individual to pass in his boat, provided such person be not a *traveller*, and provided nothing be charged for carrying.

This was an action on the case brought by the plaintiffs, for the disturbance of a right of ferry granted by letters patent to the plaintiffs across the waters of the St. Lawrence, between Kingston and Garden Island, and between Garden Island and Wolf Island.

The defendant lived on Garden Island, where he carried on a large business in loading and unloading vessels, rafting timber, and building and repairing vessels, employing a great number of hands, and it was plain from the evidence on the trial, that he had used his own boats at all times in carrying backwards and forwards, especially to and from Kingston, the members of his own family, his servants and labourers in his employment, and persons having business with him or visiting him on various pretences. The plaintiffs, while they did not admit that he had a right to use his own boats to this extent in derogation of their ferry, endeavoured to shew that he had gone even beyond that large use of them, and had allowed his boats to be employed in carrying persons from Long Island to Kingston, who were in no manner employed by him, and had no connection whatever with his business. For this they claimed damages, but not for this only, for they put it to the court at the trial, First, that if our statutes 8th Vic. c. 50, and 9th Vic. ch. 9, gave a more extensive privilege to the owners of boats in this respect, than could have been exercised at common law, yet this more extended privilege is only to be recognized with reference to summary proceedings under the 8th Vic. ch. 50, so that a party cannot be convicted before a magistrate for anything done that would come fairly within the excep-

tion stated in the statutes, but that when the owner of the ferry proceeds by action at common law, he can still claim a right of ferry as exclusive as the common law allows him. Secondly, they contend that the use which the defendant made of his boats, went beyond what either the common law or our statutes warranted. A good deal of evidence was given to shew on what occasions, and to what extent, the defendant had made use of his boats.

Verdict for the defendant.

Kirkpatrick, of Kingston, moved for a new trial on the law and evidence, and for misdirection. He relied upon *Tripp* v. *Frank*, 4 T. R. 666; 2 C. M. & R., 432.

Henderson, of Kingston shewed cause. He cited 4 T. R. 666; 2 C. M. & L. 432; 9 Vic. ch. 59, sec. 1; 3 Mod. 294.

ROBINSON, C. J., delivered the judgment of the court.

There was no dispute about the distance from either terminus to which it could be held to extend, and consequently no such point presented itself as was before the court in *Tripp* v. *Frank*, 4. T. R. 666, and *Impey* v. *Field*, 2 Cr. M. & R. 432; but the plaintiffs contended that they had been aggrieved by the defendant carrying over passengers in great numbers in his own boat, over the precise and undisputed line of their ferry.

It has been made clear enough, that it was not a trifling or imaginary loss that the plaintiffs were complaining of, if they were in fact entitled to insist upon the defendant's servants, workmen or family, or the persons having business with the defendant at Garden Island, going backwards and forwards in the plaintiff's ferry boat. The fact was shewn to be, that the defendant's establishment contained nearly all that there is of population on Garden Island. If that establishment did not exist, the right of ferry as regarded Garden Island would at any rate be but of little value, and if the defendant were precluded from using his own boats, and were compelled to avail himself of the plaintiffs' ferry on all occasions, he would be exposed to an unreasonable, if not an intolerable burthen. It was natural on the one hand, that the plaintiffs paying a considerable rent to the government for the ferry, and being obliged to keep boats for the accommodation of the public, should look with jealousy on the extent to which the defendant claimed the right of using his own boats, even for his own purposes, and should desire to confine him within the narrowest limits. And on the other hand, it did appear to me at the trial, that the defendant, on his part, was only desirous of fairly using a privilege which he might sincerely suppose the law gave

him, of using his own boats for his own purposes; that he did not desire to make a profit by carrying on as it were an illegal ferry for accommodating others and by that means making a gain to himself; and that he was not actuated by any malicious motive of prejudicing the plaintiffs in regard to their right of ferry which might lead him to interfere with their proper business for the purpose of injuring them. On the contrary, there was much to shew that the defendant was scrupulously careful not to go beyond what he claimed to be his right, and that he enjoined upon his servants not to carry over strangers in his boats for hire or otherwise, and that he did not use his boats with any view of making it a source of profit, otherwise than by saving the expense of ferriage to himself and those employed by him. If he did go beyond the limits I have mentioned, it was but in very few instances. I believe only clearly in one, and I think he was shewn to have acted throughout in that spirit, that if he did what was illegal, it was unintentional, and that he only required to know clearly what the plaintiffs could properly insist upon, to ensure his conforming to it. The one exception to which I allude was, his allowing his boat to go, not for profit, but as a favor, to take a number of the inhabitants of Long Island over to Kingston on a Sunday to attend church, their own boat, in which they had been for years in the habit of constantly crossing, being then undergoing repair in the defendant's yard. I told the jury that the patent, in the words of it, gave to the plaintiffs a right to ferry over travellers and their baggage; that these would be persons having generally no conveyance of their own; that *travellers*, in common parlance, meant persons not inhabiting in the vicinity, but coming from a distance, which construction would not include those employed by the defendant on Garden Island, and merely going between that place and Kingston on their daily or ordinary business. I considered that at common law, the defendant would be at liberty to use a boat for carrying backwards and forwards his own household and servants, or the labourers in his employment, and I could not see clearly, that the right would not extend as well to persons labouring for him at Garden Island by contract at ship building or at other work, as to persons hired at monthly or daily wages; for it might be an equal accommodation to him in the one case as in the other, by saving him an additional charge that might be made if the workmen were driven to go by the ferry. I further told the jury, that I regarded the late statute 9th Vic. ch. 9, as speaking the sense and will of the Legislature with regard to the use which all parties are to be allowed to make of their own boats, notwithstanding any right of ferry in another; that the preamble of that act evinced that the Legislature intended that the privilege was to

be liberally accorded, and that in my opinion the principle, whatever it was, must prevail throughout, and not merely when the right to convict by summary proceedings was in question: that I thought a person owning a boat was entitled under the act, at least if not at common law, to carry his guests and visitors backwards and forwards, as well as his children or servants, and also persons resorting to him for the purposes of business, so long as he did not use his boat in this manner in order to make a profit of it, by taking reward for ferrying, and so long as he did nothing for the malicious purpose of injuring the proprietor of the ferry, but acted *bonâ fide* in using his own boat for his own purposes, either of pleasure or of business. It appeared to me, and so I told the jury, that the allowing his boat to take the trip on the Sunday to bring over many persons unconnected with himself in any way, who would perhaps have gone by the ferry if he had not lent his boat, was an act not sanctioned by the statute, and was an injury to the plaintiffs' right, though the defendant did it apparently with no view to profit. I explained to the jury, that the taking no fee for ferrying did not alter the case, for that a person might by gratuitously passing persons over interfere more with the franchise of the ferry, than by making them pay. (*a*) The plaintiffs did not press for damages; they signified their object to be merely to establish their right, and that they would be content with a nominal verdict. The question therefore lay between a verdict for defendant, or a nominal verdict for the plaintiffs, which my charge did authorise the jury to give in respect of that particular instance of interference with the plaintiffs' ferry which I have described. Admitting that I was clearly right in holding that a verdict should or might be given on that ground, yet as the jury, not being misdirected to find for the defendant, did nevertheless find for him, I do not think this is a case in which a new trial should be granted. There was no evidence that the defendant has persevered in claiming a right so extensive as was exercised on that one occasion, and exercised then, as it seemed, from no bad motive. There is nothing to shew, therefore, that the granting a new trial is necessary, in order to put an end to a continuing malpractice of that kind. In general we should not grant a new trial in a case of tort, in order to enable a plaintiff to recover a nominal verdict, unless we see that a clear right is intended to be disputed. So far as this single instance is concerned, it may have been on the one side an unintentional transgression, as there was apparently no view to an illegal profit, and on the other side,

(*a*) See *Burford* v. *Oliver*, Dra. Rep. 8, where it was held that in an action on the case for disturbing plaintiff's ferry, it is not necessary to prove that the defendant either received or claimed any hire or payment.

the plaintiffs may be standing on an extreme right when they have no ground for apprehending a perseverance in anything wrong, after the right has been declared and understood. The preamble of our statute 9th Vic. ch. 9, sets out that the previous act (8th Vic. ch. 50,) "had "been so construed as to prevent parties from carrying *persons and* "*goods* in their own boats and vessels, and without hire or gain, or "hope thereof, across waters in Upper Canada within the limits of fer-"ries, contrary to the true intent and meaning of the said act." I can only infer from this, that the Legislature did not understand or intend that people should be restrained in the use they might wish to make of their own boats, provided they did not set up in effect a rival ferry by carrying people for hire. If we can suppose a person using his own boat not *bonâ fide* for his own purposes, or merely to oblige others, but in order to put down or annoy the regular ferry, I should hope that we might feel ourselves authorised to hold, that such acts, whether done for profit or not, would subject a party to an action in consequence of the illegal motive; but except in such a case, I am not prepared to say that the statute, or even the common law without aid from that statute, would not allow a person to make use of his own boat, within the limits of the ferry, in the pursuit of his business or pleasure freely, and without any necessity of shewing the particular motives or occasions he may have for allowing any individual to pass in his boat, provided such person is not a *traveller*, and provided nothing is charged for carrying. One finds little in text books upon the right of ferry, and few adjudged cases; none that lay down any principle as to the use persons may make of their own boats within the limits of a ferry. So far as my own observation has gone, I have always found that people residing on the banks of a water, over which there is a ferry, have assumed and been allowed to exercise without question, the privilege of using their own boats for any purpose of business or pleasure without enquiring whether those whom they allowed to occupy them were there servants or friends, or who they were, or what business they were upon, so long as it was not imagined that the person owning the boat was usurping the privilege of the ferry by carrying people for hire.

We are all of opinion, that we cannot properly set aside the verdict, and that the rule must be discharged. (*a*)

Per Cur.—Rule discharged.

(*a*) The several acts referred to, and those of later date, are now incorporated in the Consolidated Act of Upper Canada relating to Ferries, chap. 46, p. 456, and the act relating to Municipal Institutions, chap. 54, sec. 284, No. 4, p. 596. The previous cases upon the subject of ferries were *Burford* v. *Oliver*, Dra. Rep. 8 (note *a*, p. 66); *Kirby* v. *Lewis*, Mich. Term, 5 Vic.; *Jones* v. *Fraser*, Trin. Term, 5 & 6 Vic. See also Harrison's Municipal Manual, p. 105 note *q*.

MONAGHAN v. FERGUSON ET AL.

School Trustees—Teacher—Disturbing School—Right to sue—School property.

Under the 44th sec. of the 7th Vic. ch. 29, the trustees of the public school (and not the schoolmaster), should be made the plaintiffs in an action of trespass to the school-house; unless at least it can be shewn, that the trustees have given the school master a particular interest in the building, beyond the mere liberty of occupying it during the day for the purpose of teaching.

Trespass *quare clausum fregit*, for breaking and entering a certain school house of the plaintiff, situate on lot 17, in the 12th concession of London, making a noise and disturbance therein, breaking doors, &c.

And a second count for breaking and entering another school house of the plaintiff, and expelling him therefrom.

The defendants pleaded these pleas: first, not guilty.

Second, denial of plaintiff's property in the school house.

And third, denial of the plaintiff's possession of the school house.

The building in question was in fact a meeting house, belonging to the Methodist Society, and was vested in trustees by a deed made in 1833, upon the understanding that it was to be occupied also as a school house, on the school trustees engaging to repair any damage done to the building in consequence of its being so used. (*a*)

(*a*) In many parts of the Province, titles to Church and School property are held in this way; or in trust for a School, with a condition that the building erected on the site, shall also be used for the purposes of religious worship. Many defects are found in the titles to School sites, owing to such conditions, as also the manner in which they have been conveyed, the titles by which they are held, and the changes made by the Legislature in regard to the right to hold School Property. The following summary of the statutes relating to Common School Property will show the history of legislation on this subject:

1816.—56 Geo. III. cap. 36, provided (sec. 2), that it should be lawful for the inhabitants of any town, township, village or place, to meet together annually before the 1st of June in each year, for the purpose of making arrangements for common schools therein; and (sec. 3) that so soon as they should build or provide a suitable school-house, furnish twenty scholars, and in part provide for the payment of a teacher, then it should be lawful for such inhabitants to elect three trustees for said common school, who should have power to employ the teacher therefor. This act made no provision for the trustees holding school property, or for their incorporation or succession. It was continued by the acts 60 Geo. III or 1 Geo. IV. cap. 7 (1820), and 4 Geo. IV, cap. 8 (1824.)

1841.—4 and 5 Vic. cap. 18, repealed the foregoing, and provided (sec. 7, clause 1) for the election of common school commissioners in each township, who should, when funds were provided by the Council, acquire a site for a common school-house in each school district where no such school-house existed; and also provided (sec. 9) that the common school-houses in each township then acquired, or thereafter to be acquired under this act, with the ground whereon they are situate, &c., should thenceforward vest in and be held and possessed by the common school commissioners of the township and their successors in office for ever as trustees for the purposes of the act.

1843.—7 Vic cap. 29, repealed the preceding act, so far as it related to Upper Canada, abolished township school commissioners, and provided (sec. 43) for the annual election of three trustees for each school, and empowered them (sec.

In 1845, there was some contest about the appointment of trustees to the public school, but the prevailing party appointed the plaintiff as their teacher, and he was allowed to occupy the building as a school house for some months. In the autumn, the trustees of the meeting

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44, clause 1) to have the custody and safe keeping of the common school-house of their school district or section. This act further required (sec. 49) that any school-house to be thereafter erected, should be upon ground owned or to be acquired by the township, town or city, for that purpose.

1846.—9 Vic. cap. 20, repealed the preceding act, except such portions of it as repealed former acts; and provided (sec. 10, proviso, and sec. 26) that the title to any common school-house, and the land and premises appurtenant thereto, now vested in trustees or other persons, to and for the use of any common school, or thereafter to be purchased, acquired and conveyed for such use, shall be vested in the municipal council of the district (county) in which such school-houses and lands are situate, in trust for the use of such school, respectively; and expressly declared (sec. 25) that the trustee corporation should not at any time hold real property. But notwithstanding this restriction, the trustees were authorized to take possession of all common school property, which may have been acquired or given for common school purposes in such section, and to hold personal property, &c.

1847.—10 and 11 Vic. cap. 19, relating to cities and towns, vested (sec. 4) all lands, houses and tenements acquired for common school purposes therein, in the corporation of the city or town, but authorized (sec. 5, clause 1) the boards of trustees to take possession of all such property so vested in said corporations.

1849.—12 Vic. cap. 83, repealed the two last preceding acts, continued the restriction (sec. 28) that the trustees should not at any time hold real property, and continued the authority to such trustees (sec. 30, clause 2) to take possession of all property acquired for common school purposes in their section. This act also provided (sec. 42) that all lands, houses, tenements, and property of every description heretofore acquired for common school purposes, and vested in the district council, or in the hands of trustees in any township, town or city, should be vested in the municipal council of the township, town or city; and also that all such property to be thereafter acquired for common school purposes should be so vested in such councils in trust for the sections to which they respectively belonged.

1849.—12 Vic. cap. 81.—The Municipal Act (sec. 81, clause 8) authorized the municipality of each township, village, town or city, to pass By-laws for the purchase and acquirement of such real property as may be required for common school purposes, and also for the sale of the same when no longer required.

1850.—13 and 14 Vic. cap. 48.—The school act lately in force, repealed 7 Vic. cap 29, and 12 Vic. cap. 83, and altered the provisions of two former acts in regard to common school property. Trustees were authorized (sec. 12, clause 3) "to take possession" (as in 9 Vic. cap. 20, sec. 27, cl. 3; and 12 Vic. cap. 83, sec. 30, clause 2) and "have the custody and safe-keeping" (as in 7 Vic. cap. 29, section 44, clause 1) of all common school property which may have been acquired or given for common school purposes; and to acquire and hold as a corporation, by any title whatsoever, any "land" (the power given to councils by 9 Vic. cap. 20, and 12 Vic. cap. 83,) moveable property, moneys or income, (the power given to trustees by 9 Vic. cap. 20, and 12 Vic. cap. 83,) for common school purposes, &c., and to apply the same according to the terms of acquiring or receiving them. In the cases of union and altered sections, school sites, not required, by reason of the union or alteration, were disposed of in such manner as the inhabitants thought fit, and the proceeds ratably proportioned among the sections interested in the former site. (sec. 18, clause 4.)

1853.—16 Vic. cap. 185, prescribed (sec. 6) how trustees should acquire new school sites, or change old sites.

house wished to do some repairs to it, and it appeared to be a matter of dispute between them and the school trustees, whether the school should continue to be kept there while the work was being done. At length, on the 2nd of December, the defendants went there together, at a time when the building was locked up, broke off the lock and took away the stove pipes; since which time the plaintiff has not taught there.

It was objected at the trial, that the plaintiff, being a mere servant to the school trustees, could not bring trespass for the injury to the freehold.

The learned judge was of that opinion, and by consent a nonsuit was entered, with leave to the plaintiff to move the court to direct a verdict to be entered in his favour for 5*l*., if he should be considered entitled to recover.

J. Duggan moved accordingly. He cited 1 E. R. 244; 5 B. & Ald. 600. The plaintiff had sufficient possession as against a mere wrong-doer; 5 Q. B. R. 139; 4 B. & C. 574.

Boulton shewed cause. The plaintiff was a mere servant, and had no interest in the estate or possession except as a servant.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this rule should be discharged; the 44th clause of the School Act 7 Vic., ch. 29, gives the custody of the school house expressly to the trustees; (*a*) we must therefore, we think, regard them as being in possession, and not the teacher employed by them, even if upon general principles the facts of this case might otherwise have enabled the teacher to sue. The teacher was absent when the alleged trespass was committed; the meeting house was locked up, the books or the furniture in it we are not to look upon as his, so as to give him a constructive possession. On the contrary, we think the constructive possession was in the trustees under the law, which places the building in their keeping. The 44th clause of the act defines very clearly what are the duties and position of the trustees, when it provides that they are

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1855.—18 Vic. cap. 121.—School sites and lands when not conveniently situated may, with the consent of the municipality, be surrendered to the Crown, and sold by order of the Governor in Council, and the proceeds applied to the purposes of the school or educational institution owing or deriving benefit from said site and land. (*Quære.* Does this Act apply to Common Schools?)

The provisions of the statute 12 Vic. c. 81, sec. 31, clause 3, are now found in the Consolidated Municipal Act, chap. 54, sec. 266, No. 2, p. 589, of the statutes 13 &14 Vic. c. 48 & 16 Vic. c. 185 in the Consolidated Common School Act, c. 64,s. 27, No. 3 and sec. 44.—and of the statute, 18 Vic. cap. 121 in the Consolidated Grammar School Act, c. 63, sec, 30-35.

(*a*) The same provision is contained in the Consolidated Common School Act for Upper Canada, chap. 64, sec. 27, Nos. 3–5, p. 783. See also *School Trustees* v. *Farrell*, 5 U. C. L. J. 280.

first, "to have the custody and safe keeping of the common school house for their district;" second "to contract with, and employ all teachers within the same." (*a*) This building, by the arrangement made with the trustees, was the common school house for the time, and since the law vests in the trustees the custody and safe keeping of it, they must be regarded as being for the time in possession, unless they had actually parted with the possession, which they certainly had not done by employing a person to teach in it, for that was the very purpose for which they held it. They might have given to their teacher that kind of interest in the building, beyond his mere liberty to occupy it during the day for the purpose of teaching, which would have constituted a tenancy, but nothing of that kind is shewn. If such a relation had existed, of course the tenant, and not the landlord, must have sued for the injury that is complained of here; but, then if the trustees had placed themselves in that position with regard to the school house, they would no longer have had the actual custody of the building as the law contemplates, for that implies the means of exercising an immediate control, a power to prevent damage by instant interference, and a right to compel compensation for injuries done by others, in order that the trustees may effectually fulfil their trust of safe keeping; all of which are repugnant to the condition of a landlord. It appears to me, that the case of *Wildbor* v. *Rainforth*, 8 B. & C. 5, applies in principle to the present; there a pauper who had been allowed by the overseers of the poor to occupy a small tenement, went away leaving her children in the house; ten days afterwards the overseers entered and took possession, put locks on the doors, and removed the children to the work house; the pauper brought trespass against them, and the court held, "that she could not sue in "trespass, for she was not tenant of the premises, but was merely allowed "to occupy them by the parish officers, the occupation was in fact theirs." This, it is true, is not an action by the schoolmaster against the trustees, but neither can it be looked upon as an action against a mere stranger entering without color of right. There had arisen a dispute about the premises; the trustees of the meeting house claimed a right to enter to make repairs, and if that was an infringement of any exclusive right of possession, the question lay between them and the school trustees, and not between them and their teacher. (*b*)

Rule discharged.

(*a*) See the same section 27, No. 8.

(*b*) The Consolidated Common School Act, chap. 64, s. 189, p. 767, provides that any person wilfully disturbing any school meeting, or any grammar, common, or other public school, shall for each offence on conviction before a justice

THE QUEEN v. THE NIAGARA BOARD OF POLICE.

Mandamus—Tavern licenses—Right of municipality to retain.

Mandamus granted, directing the Board of Police of Niagara to pay over to the Inspector of Licenses the sum of 240*l.*, received by the clerk of the board for tavern licenses, for 1846 and 1847: the Court deciding that under the 17th sec. of 8 Vic. ch. 62, and the 3rd & 4th secs. of 8 Vic. ch. 72, the government, and not the Town of Niagara were entitled to receive the dues upon such licenses.

(Q. B., H. T., 10 Vic.)

In this case, a mandamus was moved to the President and Board of Police of the Town of Niagara, directing them to pay over to the Inspector of Licenses for the District of Niagara the sum of 240*l.*, received by them for granting inn licenses for the years 1846-7.

The board, on the 12th December, 1845, made a by-law, providing that "every person whose application shall be granted, to keep an inn, "or house of public entertainment, in the town of Niagara, where wine, "brandy or other spirituous liquors may be sold, shall, before obtaining "his certificate, pay to the clerk of the board of police, to and for the "uses of the town, the sum of 5*l*, and shall in addition pay to the "inspector of licenses for the said district 2*l.*, besides his fee for issuing "every such license." Under this By-law, 240*l.* was paid to the clerk of the board, for tavern licenses, for 1846-7. The inspector refused to issue any licenses upon receiving £2 only, as this by-law directed.

The inspector made oath that he demanded of the clerk and of the president of the board to pay the 240*l.* into his hands, but they refused.

Cameron, Sol. Gen., moved for the mandamus.

W. H. Blake shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the mandamus should be granted. (*a*)

The statute 8 Vic. ch. 62, sec. 17, gives the authority to the board

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of the peace, on the oath of one credible witness, forfeit and pay for the common school purposes of the school section, city, town, or village, within which the offence is committed, any sum not exceeding $20 and costs; or such person may be indicted and punished therefor as a misdemeanor.

(*a*) The writ of mandamus is a high prerogative writ of a most extensive remedial character. The power of issuing it is one of the highest and most important branches of the jurisdiction of the superior courts of law, and it may be compared to a bill in equity for specific performance. It is used principally for public purposes and to enforce the performance of public rights or duties, but may also be granted to enforce some private rights, when they are withheld by a public officer. A mandamus is not generally granted except where there is no other special legal remedy. *Rex* v. *Nottingham Water Works Co.*, 5 A & E, 365, s. c. 1 N. & P. 480. There ought in all cases be a specific legal right as well as the want of a specific legal remedy to warrant an application for a mandamus—*R.* v *Archbishop of Canterbury*, 8 East 219. If there is no other legal remedy, a corporation may be made liable to a mandamus—*R.* v *St. Katherine Dock Company*, 4 B & Ad 863. Attachment does not lie against a corporation for non-performance of award—*Gilford* v *Mills*, 2, Keble 1. Process of con-

"to regulate taverns within the Town of Niagara, and to provide for the "proper licensing of them, at such rates as to them may seem expedient." The effect of which provision is, to substitute the board within that municipality for the justices of the peace, as regards the granting of tavern licenses, fixing the rate, and regulating the taverns.

But that same clause expressly separates the duties to be paid for these tavern licenses from the duties paid on other licenses, placing the latter at the disposal of the Board of Police, for the public purposes of the town, but excepting the former.

Then it follows clearly, that these duties on tavern-licenses are to form part of the provincial revenue, as they would have done if the justices of the peace had continued to act in the matter of granting the licenses and fixing the duty. The statute 8 Vic. ch. 72, is next to be considered, and the effect of that is plain.

By the 3rd and 4th clauses, the revenue arising from all duties or licenses to "houses of public entertainment" is pledged to secure the payment of certain debentures, to be issued by the government under the authority of that act, with the interest upon them; and this without any exceptions as to towns. When, therefore, the board by their by-law assumed to impose a charge of £5 on every license to keep an *inn* or "house of public entertainment" in which spirituous liquors might be sold, to be applied to the uses of the town, in addition to the sum of £2 to be paid to the inspector, they go contrary to the law in two respects. They attempt to limit the sum payable to the inspector on account of the the provincial revenue to a rate below what the existing laws direct shall

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tempt issues against individual members of a corporation for disobeying a mandamus—*London* v *Lynne*, 1 H. Bl. 209. The Court will not order that to be done which may subject the party ordered to an action—*R.* v *Berks Justices*, 1 B & C, 485. The writ will be granted to compel making a rate because expressly required by Act of Parliament—*R.* v *St. Saviours*, 1 N & P, 486, 8 N & P, 126, 7 A & E, 925. It issues to compel a clerk to deliver up books of a public corporate company; to compel members of a corporation to deliver up books to their successors; to compel a corporation to do a corporate act; to admit or eject a member, &c.—*Tapping on Mandamus*. It may be issued against school trustees for refusing to make an order for the payment of the school fund —*Queen* v *School Trustees*, 7 U. C. Q. B, 130 (*Ibid*). Also to compel two school trustees to allow the third to inspect the books of the corporation.—*Reg. ex rel. Ferris* v. *Montgomery et al*, Q. B., Mich. Term, 1859. If there is a doubtful election and fit to be tried by information, a *quo warranto* is the proper remedy. If there is a colorable election and clearly void, a mandamus should go—*R.* v *Bankes*, 3, Burr 1454; see also *R.* v *Oxford*, 6, A & E, 349, *R.* v *Leeds*, 11, A & E 517. The affidavits on which the application is to be made should be entitled only in the court, and must clearly disclose in what official capacity, if any, the writ is intended to be directed.—*Tapping*, p. 290 (or 839). Must also show the constitution of the corporation, and the applicant's right, and that he has no other specific legal remedy.—*Ibid.* As to entitling rule *nisi* and affidavits after granting of rule *nisi*, see *In re Grantham*, 4 D & L, 427, *Tapping*, p. 414. When the writ issues the cause is in court.

at least be levied; and they take £5 out of the £7 which they charge upon the license to the use of the town; when it is clear that, under their own act of incorporation, whatever duty they should impose upon inns was not to go into the funds of the town, but was by the other statute (ch. 72), passed in the same session, directed to be appropriated to a specific Provincial purpose. (*a*)

The by-law uses the terms "inn," "a *house* of public entertainment," as connected with the licensing system, and the vending spirituous liquors by retail; they mean the same thing; and the 8 Vic., ch. 72, expressly uses the term "houses of entertainment;" so that it can hardly be supposed that the board really imagined that they were granting licenses to any of the parties in the list produced to us, of such a kind as did not come under the 59 Geo. III. ch. 2, and 3 Vic. ch. 21, and the 8th Vic. ch. 72. (*b*)

In justice to the board we must suppose, that they did not intend to levy a tax upon the public wholly apart from the statutes which relate to the subject.

They acted, no doubt, in imposing the tax, under the law which would give them authority for their proceeding, namely their own act of incorporation, and must have meant the whole 7*l.* to be a duty imposed by them, in the same sense as the justices would have imposed a rate if the power had been left in their hands.

Then when once the duty is imposed, the law directs its appropriation till the debentures have been paid off; and the duty which we must suppose them to have intended to impose under the law, must flow into the channel provided for it by the law.

It must be paid over to the inspector, to be by him transmitted to the Receiver-General, unless it be clear that it should go to the Receiver-General direct, which I do not see is the case.

Per Cur.—Rule absolute for mandamus.

(*a*) The amount payable for licenses and its appropriation is now regulated by the Consolidated Statutes, U. C., cap. 54, sec. 247, p. 584. The sum required by the Imperial Act 14 Geo. III. ch. 88, s. 5, is £1 16s. 0d. sterling, or $9 currency; and the sums required for Provincial purposes are, $12 in cities, $10 in towns, and $5 in other places. But the total sum to be paid shall not be less than $25. See also Harrison's Municipal Manual p. 128.

(*b*) The Municipal Act provides for two classes of licenses: (1) Tavern licenses for the retail of liquors to be drunk on the premises or elsewhere, (2) Shop licenses for the retail of liquors *not* to be drunk on the premises. The first named are for inns, ale-houses, beer-houses, or other houses or houses of public entertainment, and these must exhibit over their doors the words "licensed to sell wine, beer, and other spirituous and fermented liquors," under a penalty of $1. The other class are shops and stores. No liquors are to be sold at either class from seven o'clock on Saturday night till eight o'clock on Monday morning, under a penalty of $20 for first offence, $40 for second offence, $100 for third offence, and three months' imprisonment with hard labour for fourth offence.

WATSON v. CITY OF TORONTO GAS-LIGHT AND WATER COMPANY.

Nuisance—Public navigable water—Pure water—Common Law right.

A person throwing noxious matter into Lake Ontario, or any other public navigable water, is liable *both* to an indictment for committing a public nuisance, and to a private action at the suit of any individual *distinctly and peculiarly* injured.

The right which an individual has to the use of public navigable water in its pure and natural state, is not founded upon the possession of land or of a mill or house adjoining the water, but simply upon the same common law right which every other individual has, to use the water in its unadulterated state, whether he possess lands, mills or houses on its banks or not.

Semble, that in action on the case, a declaration would be open to special demurrer, in claiming damages for an injury stated to have been committed, or at least continued, after the action had been commenced.

The plaintiff declared in case—

"For that whereas before and at the time of the committing by the said company of the grievances hereinafter next mentioned, the said plaintiff was, and from thence hitherto hath been, and still is, lawfully possessed of a certain lot or parcel of land, situate and being in the City of Toronto, in the said district, and known and described, and laid down and designated on a certain plan adopted by the Common Council of the said city, as water lot No. 9, and being partly covered by the water of the Bay of Toronto; and whereas during all the time aforesaid, the said plaintiff was and still is *possessed of a certain messuage or distillery*, situate, erected and being in and upon the said lot or parcel of land, in which the said plaintiff, before and at the time of the committing of the said grievances, and from thence until the said plaintiff was forced and obliged to abandon and discontinue the same, as hereinafter mentioned, *carried on the business of distilling and manufacturing whiskey*, and, *by reason of such possession of the said messuage or distillery, and of the said lot or parcel of land, the said plaintiff was entitled to use, and did use*, and still is *entitled* to the use and benefit of the water of the said bay, in a pure wholesome and unadulterated state, *for the working of the said distillery, and for* the distilling and manufacturing of whiskey therein as aforesaid, *and for all other purposes* for which he the said plaintiff might or may require to use the same, whereby the said plaintiff, before the committing of the said grievances, made and realised divers large gains and profits. Yet the said company, well knowing the premises, but wrongfully and injuriously contriving and intending to injure, oppress and ruin the plaintiff, and to corrupt, pollute, and deteriorate the waters of the said bay, so used by the said plaintiff in his said distillery as aforesaid, and to render the said waters unfit and improper for the use of the said distillery, or for the making or manufacturing of whiskey, and to hinder and prevent the plaintiff from

obtaining and extracting the ordinary and usual quantity of whiskey or spirit from the grain that might be thereafter used and consumed in the said distillery for that purpose, and to render the whiskey that might be and was thereafter made in the said distillery useless, unpalatable, unsaleable and of no value, and to put the plaintiff to great expense and trouble, and to render the said business of distilling or manufacturing of whiskey as aforesaid, so by him carried on in the said distillery as aforesaid, not only an unprofitable, but a loosing business and to force and compel the plaintiff to abandon and discontinue the same, and to deprive him of the gains and profits which he might and could and otherwise would have made thereby, and to render the said distillery, with the implements and utensils of trade thereunto belonging, wholly useless and of no value to the said plaintiff,—afterwards and whilst the said plaintiff was so possessed of the said lot or parcel of land, and of the said messuage or distillery erected thereon as aforesaid, and so entitled to the use and in the actual use and enjoyment of the said water of the said bay as aforesaid, and whilst the said plaintiff was so carrying on his said business of distilling or manufacturing of whiskey in the said distillery, to wit, on the 1st day of January, in the year of our Lord 1844, and on divers other days and times between that day and the day of the commencement of his suit, secretly, wrongfully, injuriously and improperly, and without the knowledge or consent of the plaintiff, threw, discharged and cast into the said Bay of Toronto and into the waters thereof, in a part near to and adjoining the said lot and premises of the plaintiff, divers large and excessive quantities to wit, 100 hogsheads, of gas-tar, coal-tar, and other noxious, unwholesome, deleterious and offensive matters and substances, whereby the said waters of the said bay, which the said plaintiff had been and was accustomed to use as aforesaid, for the purposes of his said distillery and for the working thereof, and for the making and manufacturing of whiskey therein, and still is entitled to use for the purposes aforesaid in a pure, wholesome and unadulterated state, became, and during all the time aforesaid were, and still are, greatly impregnated, polluted, corrupted, adulterated and deteriorated, and rendered impure, unwholesome, and unfit and improper for the uses and purposes last aforesaid; by means whereof the said plaintiff, during all the time aforesaid, was not only prevented and hindered from obtaining, and did not nor could obtain the said water in a pure, wholesome and unadulterated state, fit and proper for the uses and purposes of the said distillery, for the working thereof and for the making and manufacturing of whiskey therein as aforesaid, but by reason of the said water having been, and being so rendered impure, unwholesome,

unfit and improper for the purposes aforesaid, he the said plaintiff hath been, and during all the time aforesaid was, and *still* is, prevented and hindered from obtaining or extracting, and did not nor could not, nor can he, obtain or extract the ordinary and usual quantity or proportion of spirit or whiskey from the grain during the time aforesaid used and consumed, or that may be hereafter used and consumed, in the said distillery, in the making or manufacturing of whiskey therein, by one-third of the amount or quantity which during the time aforesaid could and might have been, and still could and might be, obtained and extracted, had the said water remained pure, wholesome and unadulterated; and also the said plaintiff, by using and employing the said water during the time aforesaid, so being and having been rendered impure, unwholesome, and unfit and improper for the uses and purposes aforesaid (he the said plaintiff not knowing the same to have been so rendered impure, unwholesome, and improper for such purposes), obtained and extracted from the grain so used and consumed by the said plaintiff, in his said distillery, *during the time aforesaid, a much smaller* quantity, to wit, 75,000 gallons of whiskey (and which would have been of great value, to wit of the value of 750*l.* of lawful money of Canada) less than he could and might and would have obtained and extracted therefrom, had the said water, during the time aforesaid, been and remained and continued in its pure, wholesome and unadulterated state, but also the said whiskey or spirit, so during the time aforesaid obtained and extracted therefrom, to wit, 150,000 gallons of whiskey, and which otherwise would have been of great value, to wit, of the value of 1,500*l.* of lawful money aforesaid, was, by reason of the premises, greatly flavoured and impregnated with the said gas-tar, coal-tar, and other noxious, unwholesome, deleterious and offensive matters and substances aforesaid, so as aforesaid by the said company cast, discharged and thrown into the said waters of the said bay, and was thereby rendered unpalatable, unsaleable, unmarketable, wholly useless and spoiled; and also the said plaintiff, by reason of the committing by the said company of the said grievances, hath been and *was and still is prevented and hindered from carrying on his said business* with profit or advantage, and hath been and was *and still is obliged* and compelled to abandon and discontinue the same, and hath lost and been deprived of divers great gains and profits, in all amounting to a large sum of money, to wit, the sum of 2,000*l.* of lawful money aforesaid, which he might and could and otherwise would have made and realized by carrying on and continuing his said business, and also he said messuage and distillery, and all and singular the stock, implements and utensils, boilers, tubs, casks and machinery therein and

thereunto belonging and used and employed by the said plaintiff in his said trade or business, being of great value, to wit, of the value of 3,000*l.* of lawful money aforesaid, have, by reason of the premises, become and were *and still are* wholly useless and of no value to the said plaintiff. And also the said plaintiff, *during the time aforesaid*, by reason of the premises, was forced and obliged to *and did necessarily pay, lay out and expend divers large* sums of money, in the whole amounting to a a large sum of money, to wit, the sum of 500*l.* of lawful money aforesaid, in and about the construction of divers, to wit, three rectifiers, by the said plaintiff, *during the time aforesaid*, for the purpose and with the view of rectifying and purifying the said whiskey (so during the time aforesaid made and manufactured as aforesaid) from the said gas-tar, coal-tar, and other noxious, unwholesome, deleterious and offensive matters and substances aforesaid, with which the same was so flavoured and impregnated as aforesaid, constructed and built, and in and about the making and digging of divers, to wit, six wells, by the said plaintiff, during the time aforesaid, made and dug, and in and about the procuring and laying down of divers, to wit, 500 feet of leaden water pipe and 500 feet of wooden pipe, by the said plaintiff during the time aforesaid procured and laid down, and extending from the said distillery into the said bay, and in and about the endeavouring and attempting to procure good, pure and wholesome water for the working of the said distillery, and for the making and manufacturing of whiskey therein as aforesaid, in the place of the said water so rendered impure, unwholesome, and so corrupted, adulterated and deteriorated by the said company as aforesaid, and hath been and is otherwise greatly injured and damnified."

Demurrer to declaration, for that the prescription therein mentioned *is double*, being claimed *both in respect of a messuage or distillery, and lot or parcel of land;* and uncertain, being claimed in respect of a *messuage or distillery.*

Also, because the said prescription *is too large.*

Also, because the waters of the Bay of Toronto *are public navigable waters*, and no such claim of right as prescribed can exist thereto.

Also, because such use of the waters of the said bay is not claimed of right; nor is it stated or shewn that such use of such waters has of right, or otherwise, belonged to the possession of the said messuage or distillery, and lot or parcel of land.

Also, that *damages are claimed* in the said 1st count, for the said alleged grievances, *to a period subsequent* to the commencement of the action.

Also, that the said 1st count is in other respects uncertain, informal and insufficient.

Cameron, Sol. Gen., for the demurrer, cited Gale & Wheately on Easements, 8, to shew that plaintiff could not claim the use of the water by reason of a joint-right, the possession of the land *and* the possession of the distillery. He cited Str. 469; 1 H. Bl. 366; *Moffatt* v. *Roddy*, Easter Term, 1838, in our own court; 12 E. R. 429; 1 Esp. N. P. C. 148; 2 A & E. 452; 8 A. E. 314, to shew that the plaintiff had no private right to the use of public navigable waters, such as Lake Ontario, in a pure and wholesome state.

R. B. Sullivan, Q. C., contended that the easement was not claimed by any double title; that the plaintiff had merely stated his possession of land to show how he had been affected by the injury. He cited Chitty, Jr. Pre. 498, note C. 581; 2 Chitt. Plead. 545; 4 Taunt.; 4 E. R. 107. There was nothing he submitted, in the objection, that damages had been claimed for a time subsequent to the commencement of the action.—11 A. & E. 301; 5 B. & C. 269; 1 Salk. 11; 7 M. & W. 456.

There could be no doubt now, from the case of *Wilkes* v. *The Hungerford Market Company* (2 Bing N. C. 281), however much the law may seem to have been questioned in earlier decisions, that a private individual, sustaining a distinct injury from the deterioration, of public navigable waters, has a right of action against a party injuring the water.—1 M. & S. 578; 3 Kent. Comm. 437; Angel, 204, 210.

ROBINSON, C. J., delivered the judgment of the court.

Upon the principal question in this cause, our opinion is in favour of the plaintiff.

I think the injury of which he complains gives him a good cause of action, and that the only doubt is, whether his declaration is well framed.

In regard to the right of action, the defendants maintain, that the nuisance complained of, if it be a nuisance at all, is one which, from its nature, can only be treated as an injury to the public, being an alleged deterioration of the waters of Lake Ontario, which is a public navigable water, in which the plaintiff can have no peculiar interest or easement, and in respect of which, therefore, he can maintain no private action. (*a*)

(*a*) A nuisance has been defined as anything which *unlawfully* annoys or does damage to another. A nuisance may be either *public* or *private*. A public or common nuisance is such as affects or interferes with the Queen's subjects in general; a private nuisance is such as only affects or interferes with an individual in his individual capacity.—3 Bl. Com. 5. The following have been de-

They contend, that the proper and only remedy in such cases is by indictment; and they rely upon *Hubert* v. *Groves* (1 Esp. N. P. C. 148), and of the *King* v. The *Directors of the Bristol Dock Company* (12 E. R. 427.

With respect to *Hubert* v. *Groves*, Lord Kenyon, who tried the cause at Nisi Prius, took the ground that because the injury was to the King's Highway, and a public nuisance, the party's remedy was by indictment only; and though the cases of *Hart* v. *Basset* (Sir J. Raymond) and *Iveson* v. *Moore* (1 Salk. 15; 1 Ld. Rayd. 486), were cited, and it was proved that the plaintiff sustained a distinct peculiar damage to his business by the obstruction of the highway, his lordship nonsuited the plaintiff; and it is stated, that the court in banc concurred in opinion with the Chief Justice, and refused a rule to set aside the nonsuit.

The authority of this case, however, is not now recognised, and it is manifestly inconsistent both with the earlier and later authorities.

One can only account for the decision, by supposing that the evidence shewed too slight a foundation for complaining of any peculiar injury, to take the case out of the general rule, which is undoubtedly a wise and reasonable one. (*a*)

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clared nuisances: Smells which are offensive to the senses, and it is not necessary that they should be injurious to health.—*Rex* v. *Neil*, 2 C. & P. 484. Smoke coming into windows from defendant's chimneys.—*Rich* v. *Basterfield*, 2 C. & K. 257, but see 4 C. B. 783. Cornice erected so as to overhang land of another.—*Fay* v. *Prentice*, 1 Q. B. 828. Collecting together persons to the disturbance of the neighbourhood.—*Rex* v. *Moore*, 3 B. & Ad. 184. Exhibiting effigies so that footway is obstructed and public cannot pass.—*Rex* v. *Carlile*, 6 C. & P. 636. As to brothels see *Norris* v. *Smith*, 10 A. & E. 188. Exposure of person where public might see.—*Rex* v. *Webb*, 2 C. & K. 933. Changing ordinary course of water for benefit of some to the injury of others.—*Rex* v. *Trafford*, 1 B. & Ad. 874, 8 Bing. 204. Gas Company carrying refuse of gas into a great public river, whereby fish is destroyed and water rendered unfit for drink.—*Rex* v. *Medley*, 6 C. & P. 292. Obstructing highway by laying railroad along.—*Reg.* v. *Scott*, 3 Q. B. 543. Such obstruction is a public nuisance, and should be objected by information filed by the Attorney General.—*Magee* v. *London and Port Stanley R. Co.*, 6 Gr. 170. A bridge over a navigable river, impairing navigation and drainage.—*Reg.* v. *Betts*, 16 Q. B. 1022. Excavating adjoining land so as to render use of way dangerous with ordinary care.—*Barnes* v. *Ward*, 9 C. B. 392. Where a party sets up a noxious trade remote from habitations, and afterwards houses are built near.—*Rex* v. *Cross*, 2 C. & P. 483. Soap and candle manufactory creating offensive smells.—*Radenhurst* v. *Coate*, 6 Grant. 139. Plaining machine, with smoke and noise.—*Robarts* v. *Carnegie*, U. C. Ch. 7, July, 1858. A stable not a nuisance although rent lowered in consequence of its proximity.—*Lawrason* v. *Paul*, 11 U. C. Q. B. 584.

(*a*) As to number of persons to be affected, see *Reg.* v. *Webb*, 2 C. & K. 933; *Allen* v. *Lloyd*, 4 Esp. 200. It must be shewn that the injury is not irremediable, but capable of compensation by damages.—*White* v. *Cohen*, 1 Drew. 312, s. c. 17 Jur. 15. Where nuisance is of a trivial character and continued for only a few hours the court will not interfere.—*Attorney General* v. *Sheffield Gas Consumers' Co.*, 3 DeG. M. & G. 304, s. c. 17 Jur. 885.

It is to be expected that attempts will sometimes be made to claim an individual right of action upon such slender grounds, that if it were admitted the rule would become inoperative. *Hubert* v. *Groves* may have seemed to the judge at the trial to be one of that kind, though that is not made plain in the statement of the case, and the decision is not at the present day treated as an authority.

The other case, of the Bristol Dock Company, was fifteen years later, and came before very eminent judges. It is difficult to reconcile the decision with the plaintiff's right to bring an action in the case before us. That judgment seems to have been but little canvassed though it does appear to be at variance with many other cases both before and after it. and especially with *Rose* v. *Miles* (4 M. & S. 101), which was decided by some of the same judges.

The case of the Bristol Dock Company was not the case of an action brought for an alleged nuisance, but it was an application to the court, under a statute, for a *mandamus* to compel certain commissioners to make compensation for damages which they had occasioned to an individual by carrying on a public work which they were authorised to construct.

It may have seemed to the court, that the injury complained of was not the kind of damage which the statute intended should give a claim to compensation, being an injury to the business of the plaintiff, and not directly to his building or tenement; but when we look at the words of the Act of Parliament, it seems not easy to account for the decision on that supposition; (*a*) for they are very comprehensive, and the court do certainly give reasons for their judgment which are independent of the statute, and apply to the principles by which all actions of this kind are to be governed; but in doing so, they certainly seem to have lost sight of the peculiar grounds of damage—very substantial, certainly—on which the plaintiff founded his claim.

These are very plainly and strongly stated, and are explicitly acknowledged in the later case of *Rose* v. *Miles*; and it is hard to understand how the same judge could have held, in the one case, the doctrine which he is reported to have held in the other. It is embarrassing, certainly, to meet with such a case as that of the Bristol Dock Company, while we are called upon to pronounce upon the question before us; for in its circumstances, it more closely resembles the present than any other that can be found. And yet we cannot venture to abide by it, when it is

(*a*) It was admitted in the case referred to, that the express words of the statute had taken away the remedy by indictment.

found to be plainly opposed to other authorities, and opposed to reason and justice as it seems to me.

In a case before Baron Wood, at the Durham assizes, tried two years before and reported in a note to 1 Camp. 517, the principle is laid down in accordance, as it appears to me with reason and authority. "A "navigable river," he says, "is a public highway, and all persons have "a right to come there in ships, and to load and unload, and stay as "long as they please; *nevertheless, if they abuse that right, so as to "work a private injury, they are liable to an action.*" (*a*)

Now, looking at the waters of this bay as navigable waters, the right of the public to use them as a highway gives of course no right to throw poisonous or noxious matter into the waters; and if they do this for any purpose, they must shew a legal authority for what is *primâ facie* a wrong, or they must answer to the public for what may be a public nuisance, and to individuals (for so I take the law to be well settled) for any special or peculiar damage which they may receive in the exercise of their lawful rights, from such unlawful act.

The case of *Wilkes* v. the *Hungerford Market Company* (2 Bing. N. C. 281) fully maintains the right of individuals in such cases to bring an action, and I can conceive no sensible ground on which we could hold, that an injury of this description done to the quality of the water which all have a common right to use, will not give a right to an action, as well as an injury occasioned to an individual by obstructing him in the use of the water for purposes of navigation.

Whatever may be proved to have been the case in fact, the injury stated in this record is certainly a very grievous and substantial one.

The right to use the water for any purpose not interfering with public rights, or other private rights resting on the same common foundation, cannot be denied; and if the plaintiff had, as I think he had for all that appears, a right to have and use his distillery, and to supply it with water from the bay, he might no doubt be ruined, and not merely injured, by such an injury as he has here complained of.

How truly he has complained of it, is not now the question.

(*a*) In a case where commissioners were authorized to make a new cut through land adjoining a river for the purpose of restoring navigation, and also to build bridges, and a company, in which the powers of the commissioners afterwards became vested by statute, built a bridge occupying to some extent the bed of the new cut. On indictment against them for a nuisance to the river as a public highway, the jury found specially that the company were guilty of building the bridge, but that it did not obstruct the navigation. On a motion to enter a verdict for the defendants, it was held that the cut was a public navigable river, that its obstruction was an indictable offence, but that building a bridge partly in the bed of a navigable river was not necessarily a nuisance; that the question of obstruction was for the jury, and their verdict was in effect an acquittal.—*Reg.* v. *Betts*, 16 Q. B. 1022.

But we are of opinion that both counts are insufficient by reason of the objections urged against them, that the plaintiff claims in them the right to the use of the water by reason *of the possession of the messuage or distillery and of the land*, thus resting his right upon two or three grounds, leaving it uncertain which, when he could not in law claim a right upon any such ground, but simply upon the same common right to use the water for any purpose which every other person had, not by any prescription, not by occupancy, not as an easement annexed to any house or land, but merely by the same right as he and all others have to go anywhere else upon Lake Ontario, and take water for their purposes, whether they possess any house or land upon its banks or not—the same right, in short, that any person has, not to die of thirst upon the banks of a navigable water which is by law accessible to all. (*a*)

It was no doubt right and reasonable to state the plaintiff's possession and use of the distillery, as shewing how he came to sustain a great and special damage; but the plaintiff should not have grounded his right to the water expressly, as he has done, upon the fact of his possession of the messuage and land.

The other objection, that damages are claimed for an injury stated to have been committed, or at least continued, after the action was commenced, seems to me to have at least so much force in it, that the plaintiff will do well to amend in that particular, as well as in the last adverted to.

It is true that in England, since the Uniformity of Process Act, as well as before, and although the suing out process is there as well as here the beginning of the suit, the form of declaration used in such cases as the present, does still as formerly, retain the statement of "*adhuc*

(*a*) A right to use water may be either public or private. From some privileges of this kind none can be excluded—they are the common birthright of all Her Majesty's subjects.—*Woolrych on Waters* p. 1. The right of the public is paramount to any right of property in the Crown.—*Williams* v. *Wilcox*, 8 N. & P. 606. The right of passage over the sea and great rivers is free, common and universal. As a general doctrine, fisheries in the sea and in public navigable rivers are open to all. In rivers not navigable, there may be at least three kinds of fisheries, namely, a fishery enjoyed by the owner himself as a territorial possession—a right of fishery granted to him—and a right enjoyed in common with others, either by grant or prescription. The privilege of bathing may exist by custom or prescription—but there is no common law right of bathing in the sea (*Blundell* v. *Catterall*, 5 B. & A. 268); and by inference there can be none such in a river. A watercourse (an easement) may be claimed in a public river; and in private rivers, the possessor of such a right cannot use it to the detriment of his neighbour. Inhabitants generally, or persons residing in a particular place, may also have a right to water their cattle in rivers at spots where they had an immemorial usage to do so. Other customs and prescriptions to use water in various ways may also be acquired at particular places and by particular individuals or communities.—See *Woolrych on Waters*, pp. 1-3.

existit," as this declaration does; and they seem in this respect liable to exception, as claiming damages up to the time of declaring. Indeed, Mr. Chitty (2 Ch. Plds. 583), says that in some cases this *adhuc existit* would be improper, and yet he retains it in all the forms, I think which he has given, without explaining why it would be more safe to do so in those instances than in any others.

In *Carter* v. *Canthrope* (4 Mod. 153) the court treated those words as mere words of form, used in most declarations, not intended to claim damages beyond the commencement of the suit, but inserted merely to shew that the defendant had not abated the nuisance.

Without going more into this point, which is discussed in a note to 2 Saunders, 171, I will only add, that the pleadings in both counts are such, as to make them more open to the objection than they would be in such a case; the manufacturing of large quantities of whiskey, which proved to be unsaleable, from the manner in which the water had been damaged and which is alleged in order to prove the special damage, being so stated as that it may at least be said, it does not appear to have been a damage accrued before the action brought, or by reason of any act done by the defendants before the action brought; and the same may be said of the manner in which the statement is made, of the defendants throwing the coal-oil, &c., into the water.

This is not like the more common case of some act done which occasions a continuing injury, as the erection of a dam, &c.; (*a*) but the damage to the water was occasioned day by day, as the noxious matter was thrown, and could not have continued to be felt for any length of time, unless the injury had been constantly renewed.

The plaintiff should frame his declaration, conforming his statement of injury and his claim for damage, more clearly to the period preceding the commencement of his action.

Per Cur.—Judgment for the defendants on the demurrer, with leave to the plaintiff to amend, paying costs.

(*a*) By Magna Charta it was declared that "all wears from henceforth shall be utterly put down by Thames and Medway, and through all England but only by the sea coast." The annoyance having been afterwards renewed to some extent, it was enacted that whereas the common passage of boats and ships in the great rivers of England be oftentimes annoyed by the inhansing of gorces (a deep pit of water), mills, wears, stanks, stakes and kiddles (open wears, where by fish are caught), such gorces, &c., shall be out and utterly pulled down without being renewed. Afterwards a penalty of 100 marks was prescribed against such as should repair such annoyances.

LOW ET AL v. OTTAWA DISTRICT COUNCIL.

Assumpsit—Municipal Council—Justices—Treasurer.

The 43rd clause of the District Council Act, 4 & 5 Vic. ch. 10, does not subject a District Council to be sued *upon an implied assumpsit*, by reason of any transaction that may have occurred between the plaintiff and the justices in quarter sessions, or the treasurer of the district, before the existence of the council.

Semble—The District Council is not identical with the former Court of Quarter Sessions.

District Councils are only liable on those express contracts made by the Justices or Treasurer, under enactments of particular statutes.

(Q. B., H. T., 11 Vic.)

Special case.

The facts, so far as they bear upon the point decided, are sufficiently stated in the judgment of the court.

P. M. Vankoughnet, for the plaintiff.

Cameron, Sol. Gen., for the defendant.

ROBINSON, C. J., delivered the judgment of the court.

The first question is, can this action be maintained, brought as I infer it to be (for the pleadings are not before us) wholly on the common counts, against the District Council established by 4 & 5 Vic. ch. 10, not for any debt or demand contracted for or due by them, by reason of anything happening or done in their time, but on a supposed implied assumpsit arising out of transactions anterior to the existence of any district council? I see nothing stated to have been done by the District Council, which could support this action as on an undertaking by themselves—nothing but propositions and reports, and ineffectual attempts to settle the matter, not leading to any unqualified or direct admission of a claim upon the council. Then, looking at the question as upon a liability supposed to lie upon the district, by reason of what was done before the District Council existed, the District Council is not identical with the former Court of Quarter Sessions; and it could not follow as a matter of course, that whenever an individual, by reason of something that had occurred between himself and the justices in sessions before these councils were established, had a claim, either equitable or legal (if there could be any legal claim in the strict sense of the term), against the quarter sessions, he would therefore have a right of action upon such claim against the District Council, merely because the District Council Act, in its 1st clause, makes them liable as a corporation to be sued.

There clearly could have been no recourse against the Council upon any such cause of action as I have stated, if it were not for the special provision made by the 43rd clause; and that provision, in our opinion, is confined to express contracts, made under such circumstances, that

there would have been a legal recourse against the district, through the justices or the treasurer, if this statute had not created the new body, to stand in their place in such matters. These were transactions of that kind, such as contracts for gaols and court-houses, and perhaps others, into which the justices, or a committee of them, had power to enter, and thereby to bind the district under enactments of particular statutes. (*a*) I have no idea that the legislature intended by that 43rd clause to subject the District Council in their corporate capacity, to actions of this kind upon implied assumpsit, whenever an individual, who had at any time paid taxes, or bought lands sold for taxes, or done any other act which brought him in contact with the justices in session or the treasurer, may imagine that he has a pecuniary claim resulting from such transaction, by mere operation of law, and not under any express contract. For any such claim he could not have sued the justices in sessions, and cannot, in my opinion, upon such a claim, sue the District Council under the 43rd clause of the act.

It is quite impossible, in our opinion (without going into any of the other questions raised), to sustain this action for money had and received for the use of the District Council, for the purpose of recovering under it moneys which the District Council never had or received, but which were paid into the district treasury ten years before the District Council Act was passed, and must as we may suppose, have been long ago expended under the direction of the justices or the acts of the legislature, towards supporting the public expenses of the district.

The case of *McKee* v. *the Huron District Council*, decided in this court (*ante* p. 15), was referred to in the argument. I continue of the opinion which I then expressed. (*b*)

Per Cur.—*Postea* to defendant.

SHIRELY, SUPERINTENDENT OF COMMON SCHOOLS v. HOPE.

Schools—Local Superintendent—Collector—Right to sue—Penalties.

A township superintendent of Common Schools, appointed under the act 7 Vic., ch. 29, since repealed by the act 9 Vic. ch. 20, sec. 45, has since such repeal no legal authority to sue the collector of the township for monies received by him, *not in the nature of penalties.*

(Q. B., E. T., 11 Vic.)

This was an action of debt brought by the plaintiff, as superintendent of common schools for the township of Camden, under the act 7 Vic.,

(*a*) See *Keating* v. *Simcoe District Council*, *ante* p. 8.

(*b*) This case seems to relate to that of *Ottawa District Council* v. *Low et al*, *ante* p. 1.

ch. 29, against the defendant, for money alleged to have been received and collected by the defendant as collector for the township of Camden, for the year 1845, which money is alleged to have been placed on the rate roll for the township of Camden, under the provisions of the above mentioned act.

The plaintiff alleged that it was the duty of the defendant as collector to pay over to him, as superintendent of common schools in Camden, the monies so collected; (*a*) and that the defendant then became and was indebted to the plaintiff in the sum of 400*l.*, for so such money received by the defendant as such collector, for the use of the plaintiff as such superintendent, whereby and by reason of the non-payment of the said sum of money an action had accrued to the plaintiff, to demand and have from the defendant the sum of 14*l.*, the amount for which the action is brought.

The defendant demurred to the declaration, and assigned a great many causes of demurrer, and amongst others, that no authority was given by the act 7 Vic. ch. 29, to sue for any moneys except penalties, and for forfeitures, and that the said statute had been repealed, and no action could be sustained under it.

K. McKenzie, of Kingston, for the demurrer, relied upon 13 M. & W. 267; 3 M. & W. 633.

Breakenridge, contra contended that the action might lie, as the process had in fact been taken out before the passing of the act 9 Vic., ch. 20, sec. 45.

ROBINSON, C. J.—This action was brought by a township superintendent of common schools, appointed under the act, 7 Vic., ch. 29, under the idea that the 14th clause of that act by making it his duty to apply for and receive from the collector of the township all the money received for common schools, gave him legal authority to sue the collector for any such monies in his hands not paid over, although the clause does not expressly give him power to sue, except for *penalties and forfeitures*.

But it is objected, that if the plaintiff could ever have maintained the present action under that statute, still he must now fail, because that act has been repealed by 9 Vic., ch. 20, sec. 45, and so it clearly has been since 1st January last, after which period this action was brought.

(*a*) This was the law under the statute referred to. By the 9 Vic. c. 20, such moneys were directed to be paid into the hands of the District Superintendent, but the system was altered, in 1850, (by 13 & 14 Vic. c. 48) by providing that the Municipal Treasurers should also be Treasurers of school moneys. See also Consolidated Act of U. C. c. 64.

The new act makes different provisions for the several objects of the former act, abolishing altogether the office of township superintendent, in which capacity alone, the plaintiff could have maintained the suit. There is a saving in the repeal (45th) clause to the effect, that "all "penalties incurred under the former act, shall be collected in the same "manner as if that act were in force;" and the 14th sec. of the repealed act had provided, that the township superintendent was to sue for and collect by his name of office all penalties imposed by the act, with respect to which no other provision was made, and which shall be incurred by any officer or inhabitant of the township.

But the late township superintendent is certainly not suing here for any penalty or forfeiture, he does not therefore come under this provision in the new statute; and we cannot recognize him as an existing officer for any other purpose since the repeal of the act, for that puts an end to his duties and authority, and substitutes another officer for him.

The collector could not now legally pay into the plaintiff's hands the money for which he is here suing; he cannot therefore be liable to an action brought in his name. (*a*)

MACAULAY, J.—The money was received by the collector to the use of the township superintendent, but not of an individual no longer superintendent.

Had the statute 7 Vic. ch. 29, continued in force, it is probable an action of debt might lie, at the suit of the township superintendent, against the collector for the school rates when levied; the act directing the collector to pay the same over to him, and authorising him to receive the same.—4 B. & C. 962; 9 B. & C. 752; 6 A. &. E. 943. (*b*)

But the act has been repealed, the plaintiff is no longer such superintendent, there is no such office or officer, and under such circumstances, I apprehend, the remedy is not an action by the plaintiff, in his own individual name, to recover money to which he is no longer entitled.

MCLEAN, J.—By the 45th sec. of the act 9 Vic, ch. 20, the act 7 Vic., ch. 29, is repealed, from and after the 1st day of January, 1847, but all penalties incurred under the repealed act, shall be collected in

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(*a*) The very nature and foundation of the action for money had and received is that the plaintiff is in conscience entitled to the money sought to be recovered. —*Broom's Legal Maxims*, p. 58. It lies only for money which, *ex æquo et bono*, the defendant ought to refund.—*Moses* v. *Macfarlane*, 2 Burr. 1012.

(*b*) The ground upon which an action of this description is maintained, is that the money received by the defendant is money which, *ex æquo et bono*, ought to be paid over to the plaintiff. When money has been received without consideration, or upon a consideration that has failed, the recipient holds it, *ex æquo et bono*, for the plaintiff.—Per Tindal, C. J., in *Edwards* v. *Bates*, 8 Scott, N.R. 414.

the same manner as if the act continued in force, and all monies in the hands of township superintendents of schools on the 1st day of January, 1847, are required to be immediately thereafter paid over to the district superintendents, to be retained and disposed of by them as other monies remaining in their hands, at the end of the year.

The situation of township superintendent of schools is abolished, by the repeal of the act 7 Vic., ch. 29, and the only duty left to them to perform under the new act, is the collection of penalties incurred under the former act.

The amount which the plaintiff sues for is clearly not a penalty, and I do not see that under either act, the township superintendent had authority to sue for any other monies, though under the first he might be entitled to receive monies from the collector, for particular purposes connected with the schools.

This objection alone destroys the plaintiff's right of action, even had the situation been still recognized and existing by law; but the situation being abolished, no action could be maintained even for penalties, if it were not expressly sanctioned by the new act.

Per Cur.—Judgment for the defendant on demurrer.

HURON DISTRICT COUNCIL v. LONDON DISTRICT COUNCIL.

Municipal Councils—Right to sue each other—Form of action—Pleading—Demurrer.

One district council may sue another district council for a cause of action connected with their public duties; and the balance of district revenue which one district withholds from another affords legal ground for such an action.

A district council cannot be sued upon the common money count upon the account stated, unless at least the subject matter of account be averred, and is seen to be such as can by law create a debt from the defendants to the plaintiffs, to be satisfied out of the funds of the district.

To recite certain statutes as statutes of the province of "*Canada*," when they are in fact statutes of the former province of "*Upper Canada*," is bad on general demurrer.

It is also bad on general demurrer, to refer to any statute as having been passed in *two of the years* (as the 4th and 5th) of her Majesty's reign.

Semble: That it was not necessary, before action, to give a notice to *the treasurer* of the London district of the claim of the plaintiff against the district.

Semble also: That it was necessary, in order to a right to action, to aver a request from the plaintiff to the defendant to pay over the money due.

Semble also: That in suing for a debt as due by the district, under the 43rd clause of the 4th and 5th Victoria, chap. 10, it should be averred that the defendants have funds to pay the debt, after discharging the demands to which the 59*th clause* gives a preference.

(Q. B., T. T., 11 Vic.)

The plaintiff declared against the defendant on three counts. The 1st count recited the Act of 1 Vic. ch. 26, sec. 5, 13, and the 2nd Vic.

ch. 30; and then averred, that to wit, on the 11th of July, A.D. 1839, the justices of London in the Quarter Sessions determined that the proportion of ordinary expenses to be borne by the county of Huron, should be equal to one-seventh of the ordinary expenses of the District of London; and that it became the duty of the treasurer of London to deduct the same from the rates and assessments of Huron, and to pay over the residue of such rates to the *said treasurer of the county of Huron*, yet the said treasurer not regarding his duty, did not pay over annually to the *treasurer of the county of Huron*, the balance of rates and assessments as aforesaid, but wholly failed and made default whereby a large sum of money in each year remained unpaid to the said *treasurer of Huron county*, and was retained by the treasurer of the London District, contrary to his duty, for and by order of the justices of the London District and at their disposal.

The plaintiff averred, that on the 14th Oct., 1841, when said county of Huron was declared a separate district, 376*l.* 14*s.* 6*d.* being the aggregate amount of the moneys so retained, was due and payable to the *treasurer of the county of Huron* by the London treasurer, but was wrongfully withheld as aforesaid. The plaintiff recited another act, 4 & 5 Vic. ch. 10, sec. 43, (speaking of the act "*as passed in the 4th & 5th years of the reign of Queen Victoria*") that district councils should assume all debts, &c. on the 1st *January*, 1842, and averred that the said sum of 376*l.* 14*s.* 6*d.* remained due on 1st January, 1842.

The 2nd count recited 1 Vic. ch. 26, sec. 5, 13, and 2 Vic. ch. 30, and averred one-seventh delivered as aforesaid, &c., but that in 1844, there was a deduction made of five twenty-eighths, being one twenty-eighth too much, and that on the 14th Oct., 1841, 158*l.* 0*s.* 6*d.* remained due, but was withheld, contrary to defendants' duty, &c.

3rd count, the common count on an account stated.

Demurrer to 1st and 2nd counts, because no action for such demands would lie.

To 3rd count, 1st because no such action was sustainable; 2nd, subject of account stated not shewn; 3rd, that it was under *sealed* authority.

In addition to the special grounds of demurrer assigned to the 1st and 2nd counts, the defendants filed with the court the following:

1st. That there was no act of the parliament of *this province* authorising the erection of the county of Huron into a separate district.

2nd. That there was no act of the parliament of *this province* passed in the second year of the reign of the now Queen, as stated in the said counts.

3rd. That it was not alleged in either of the said counts that any Treasurer for the county of Huron was ever appointed.

4th. That the surplus rates, if any, were to be paid to the Treasurer, for the account of the district or county of Huron; and not of the magistrates, as stated in the said counts.

5th. That it was not averred that, the Treasurer of the London district had notice of the supposed decision of the magistrates.

6th. That it was not shewn that any rates or assessments were collected in the county of Huron, or paid to the treasurer of the London district, nor that there was any annual surplus.

7th. That it was not averred that any demand was ever made by any authority, or by any person, upon the Treasurer of the London district, for the money claimed to be due.

8th. That it did not appear what surplus rates, if any, became due in each year (the statute providing for yearly payments by the Treasurer of the London district), but only that a gross sum in all became due, and not for any year in particular.

9th. That the breaches should have been several, and for the non-payment of the surplus rates of each year.

10th. That there cannot be a statute passed in the fourth and fifth years of the reign of her Majesty; and it did not appear by what parliament the said supposed act was passed.

H. J. Boulton, Q. C., for the demurrer. He referred to the several grounds of demurrer mentioned above, and cited 2 Mod. 44; 2 T. R. 476; 3 Tyr. 26; 1 Saund. 269 (a) note 2; 1. A. & E. 329; 2 E. R. 342; 2 B. &. C. 684; *Beikie* v. *Ruggles*, U. C. R.; 6 T. B. 776; 1 Ch. Pl. 215.

P. M. Vankoughnet, contra. He referred to *Low* v. *Ottawa District Council, ante* p. 85; 8 L. Times, 859; 5 Bing. N. C. 253; 4 B & C. 962; 5 A. & E. 829; Ibid. 846; *Metcalf* v. *McKenzie*, 2 U. C. R.

The arguments of counsel immediately referring to the District Council Acts, as well as to the several points raised on demurrer, are fully stated in the judgment of the court.

ROBINSON, C. J.—The first point that was made in the argument is, as to the right of the District Council to sue, and their liability to be sued, *in any case.*

By 4 and 5 Vic. ch. 10, the inhabitants of each district are incorporated, and are made capable of suing and of being sued, and "of "making and entering into such contracts and agreements as may be

"necessary for the exercise of their corporate functions." (*a*) These powers, it is enacted, shall be exercised by and through and in the name of the council of every such district respectively. (Sec. 1.)

They can only, we see make such contracts as may be necessary for the exercise of their corporate functions, and it follows, as they can bind themselves by no express contract except such as may be necessary for the exercise of their corporate functions, neither can there be any implied contract raised against them, except of the same description. In other words, they can only be assumed to have agreed to do what the law makes it their duty to do. (*b*)

The 43rd clause enacts, "that all lawful debts and liabilities of any "district, or of the justices or treasurer for the same in respect of such "district, *shall be assumed and paid* by the District Council thereof, "upon, from and after the first day of January, 1842, on the same terms "and conditions as they would have been payable by, and might have "been enforced against, such district treasurer or justices, and all debts, "obligations and *liabilities of any kind* whatever, due to, or contracted "in favour of such district, or to or in favour of such treasurer or justices "in respect thereof, and all property whatsoever belonging to the dis- "trict, shall at the said time (1st January, 1842,) become vested in, "and due to, and may be enforced by the district council, on the same "terms and conditions as they would have been due to, and might have "been enforced by such district, or the justices of the peace, or the "treasurer for the same, if this act had not been passed." (*c*)

By the act for the erection of the Huron District, 1 Vic. ch. 26, it was enacted, that the justices of the peace residing within the County of Huron (which then formed part of the District of London, but which it was proposed to erect into the new district,) should obtain plans and estimates for a gaol and court house, and a committee was to be appointed

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(*a*) A corporation, being an invisible body, cannot manifest its will by oral communication. A peculiar mode has therefore been devised for the authentic expression of its intention, namely, the affixing of its common seal; and it has been held that though the particular members may express their private assent by words, or signing their names, yet this does not bind the corporation. It is the affixing of the seal, and that only, which unites the several assents of the individuals composing it, and makes one joint assent of the whole. (*Smith's Mercantile Law*, B. I. cap. 4.) This doctrine has been modified in the case of executed contracts. (See *Pim* v. *Municipal Council of Ontario*, and *Marshall* v. *School Trustees of Kitley*, in the Court of Appeal, U. C.)

(*b*) See note *d* to *Harrison's Municipal Manual*, p. 8.

(*c*) Provisions relating to the adjustment of debts between counties on their separation, will be found in sec. 46 of the Consolidated Municipal Act U. C. cap. 54, p. 538.

for entering into contracts, which committee was to be under the control of the justices within that county.

The effect of those clauses in the act clearly is, that the committee was to have power to contract in the name of the district, *or of the inhabitants of the district*, with some person who would undertake to build the gaol, and that so soon as the new district was proclaimed, then this committee would cease to exist, the justices of the district would come in their place, the treasurer of the new district would come in the place of the treasurer of the building committee, and the obligation to pay for the gaol and court house would be an obligation incumbent on the district, as represented, before the 4th and 5th Vic. ch. 10, by the justices in sessions, having been imposed upon them through the agency of this temporary committee, whose existence was clearly to cease when the County of Huron should become a district. (*a*)

Then it seems to follow, that the contractor for the building would, under the 48rd clause of the District Council Act, have a right to treat any debt under the contract with the building committee as a debt due to him by the district council. They have no discretion as to assuming or paying it, but are bound by the statute to do both; the law imposes the debt upon them as representing the district, and as being an incorporated body, against whom a legal remedy can be conveniently had by an ordinary action. It would be a debt, I think, for which the Huron District Council might be sued under the first clause of the act. (*b*) Then if this be so, it must follow as a consequence, that the District Council of Huron has a legal right to whatever funds are by law appropriated to the payment of the charge for building the gaol and court house, and not the person who was treasurer of the building committee, for he has no longer anything to do with the matter; if he should be still in existence, his authority and duties are at an end.

I thought that during the argument, that there might be found some legal objection to this remedy by action by one district council against another, in respect to a cause of action connected with their public duty, and that the remedy should rather be by *mandamus*; but all their duties are public duties, and all their acts have reference to public interests and measures, and if resort must on that account be had to *mandamus*

(*a*) Instead of a "building committee," as provided for under the old system, the reeves and deputy reeves of the junior county, by the present Municipal Act, form into a provisional corporation for the purpose of acquiring the necessary lands for a court-house and gaol, and the erection of the necessary buildings for the same, and for other purposes, prior to the junior county becoming a separate municipality. (See sec. 44.)

(*b*) See *Keating* v. *Simcoe District Council*, *ante* p. 8.

in one such case of a clear debt, then I cannot see why they should not be confined to that remedy in all cases.

But if we were to hold that, then the power to sue them would have been given by the statute in vain. They were not like the supreme government of the country; they constitute a municipal corporation for local purposes defined by law; they are not under the control and direction of the executive government, as a receiver-general appointed by the crown is; they have precise legal duties cast upon them by law, and when the law directs that they shall pay their debts, and that they shall be liable to be sued, I do not know upon what cause of action they could more clearly be liable to be sued, than for non-payment of a debt. Undoubtedly the question arises, and it may be a difficult one to answer in some respects, out of what assets is an execution against them to be satisfied? (*a*) But no consideration of that kind can justify us in denying that a district council can be sued, because the statute is express that it may be sued, and the same difficulty would apply in any other action as in this.

We are not to assume that the council will not voluntarily apply the district funds in discharging any demand which they are legally adjudged to pay, without the seizure and sale of any corporate property, and if not, yet we cannot assume there is no such property which could be legally seized and sold.

If after all, the judgment should turn out to be fruitless, that would be an inconvenience for which we are not responsible.

Upon the best consideration which I can give to the matter, I can see no good reason why these district councils, which are all liable to sue and be sued by individuals, may not sue and be sued by each other, just as any incorporated cities might, or indeed any incorporated companies to which the capacity to sue and be sued is given by law.

It is also my opinion that any balance of district revenue, which may have been withheld from the district of Huron, by the district of London, which it was clearly the duty of the latter to pay over to the former, affords a legal ground for such an action. (*b*)

It has been argued that the 43rd clause, in the terms of it, only gives an action where the justices of the peace might have sued or been sued, if the District Council Act had not been passed.

(*a*) By sec. 221 of the present Act, cap. 54, a writ of execution against a municipal corporation may be endorsed with a direction to the sheriff to levy the amount of the execution by rate, according to the assessment roll.

(*b*) See sec. 60, No. 8, p. 526.

The same argument was used in *Low* v. *Ottawa District Council* (*ante* p. 85), in this court, but we held then as we must hold now, that that is clearly not the effect or intention of the clause, or there would be no value in the power conferred by the act, since the justices could clearly not have sued or been sued, as representing the district in any case of the kind.

It is to the terms and conditions of previous debts and contracts, that the restrictive language of the clause applies, and these are not to be changed, though the form of remedy is.

I think therefore, that so far merely as the general principle is concerned, without regard to particular exceptions, the action may be sustained.

Then as to the exceptions, I think it is a good exception to the first and second counts, upon general demurrer, that there is no such statutes of the province, that is of "Canada," as are recited in those counts those set out being both statutes of the former province of Upper Canada; and it is also a good exception that there is not, and cannot have been any statute passed in the *fourth* and *fifth* years of Her Majesty's reign; the statute was in fact passed in the fifth year of Her Majesty's reign, in a session which was held partly in one year and partly in the other, and this exception I am also of opinion must prevail on general demurrer. (*a*) It has been so decided in England, for though the statute need not be so particularly recited, yet we cannot reject the description which the plaintiff has chosen to give of it as surplusage.

(*a*) Notwithstanding the rule here laid down, the Legislature itself has sometimes recited acts as "passed in the fourth and fifth years of her Majesty's reign" (see 18 Vic. cap. 180), "Act of the Parliament of this Province, passed in the thirteenth and fourteenth years of Her Majesty's reign" (see 19 & 20 Vic. c. 90), sometimes as "the Act eighteenth Victoria, &c." (see 20 Vic. c. 20), "the Act of thirteenth and fourteenth Victoria, &c." (see 20 Vic. c. 72), "the Act sixteenth Victoria, &c. (see 20 Vic. c. 80), sometimes as "the Act of 1841, intituled, &c." (see 20 Vic. c. 55), "the Act of 1849, intituled, &c. (see 20 Vic. c. 73).

When the session of Parliament does not extend into two years of the reign, the act is usually entitled as "passed in the ——— year (naming it) of Her Majesty's reign." The practice of giving short titles to Acts of Parliament is now becoming very general, and is a great improvement upon the old practice. By chapter 1 of the Consolidated Statutes for Upper Canada, it is provided that "Any chapter of the said Statutes may be recited and referred to in any act and proceeding whatever, civil and criminal, either by its *title* as an *Act*, or by its *number* as a *chapter*, in the copies printed by the Queen's printer, or by its *short title*. The same provision is contained in the statute respecting the Consolidated Statutes of Canada, sec. 16. And by chapter 2 of the Consolidated Statutes for Upper Canada, it is provided that "in pleading, citing, or otherwise referring to them, or any of them, it shall be sufficient to use the expression 'the Consolidated Statutes for Upper Canada,' adding the chapter when necessary."

He professes to ground his action upon such a statute as he describes, and we must notice judicially that he misrecites it.

The statement, that on the 14th of October, 1841, when the new district was proclaimed, a large balance became payable to the treasurer of the county of Huron, is not correct. The District Council Act had then been passed, there was no such person as treasurer of the county of Huron, the money was payable in January, 1842, to the district council, and before that should have been paid to the treasurer of the new district.

As to the objection that notice to the treasurer of the district of London, of the order made by the justices under the act 2 Vic. ch. 30, should have been averred, there does not seem to me to be anything in that. It is not the object of this action to convict the treasurer of a default or to fix him personally with a liability. The plaintiffs are suing for a sum of money alleged to be still remaining in the treasury of the district of London, but which ought, they say, to be paid over to them. It is now of no consequence whether the treasurer ought to have paid it before or not. The question is, whether it is due to the plaintiffs. (*a*) The justices must be supposed to have been cognizant of their own order. The treasurer was but their subordinate officer, whose accounts they were bound to inspect, and to see that he made all such payments as ought by law to be made out of the district funds; and if the treasurer did not in fact pay over the money now sued for, either from his own inattention or theirs, that would not affect the right of the district of Huron to claim it as a debt still due to them by the district of London.

But I am not quite clear that the objection is not well founded that a request by the plaintiffs to the defendant to pay over the money was necessary to give a right of action, and should therefore have been averred. The language of the judges in the case of *Simpson* v. *Routh et al.*, 2 B. & C., 672, tends strongly to support it.

It is not, however, material to go through all the causes of demurrer insisted upon in the argument.

Upon several of the grounds, mentioned, I think the first and second counts are bad on general demurrer, though the plaintiffs could, in my opinion, by amending them, sustain their action.

As to the third count being the ordinary count upon an account stated, I am not of opinion that it can be supported. The district council is not a corporation for trading purposes. They represent the

(*a*) See notes *a* and *b*, page 88 *ante*.

inhabitants of the district for the better carrying into effect certain public objects, among others to raise and expend the public money in the manner regulated by law. The moneys subject to their control are raised by taxation upon the people under the authority of public statutes. The district councils have no power to do with them as they like; they act in a merely representative capacity, and their acts are legal so far only as they are within the sphere of their authority. They cannot give a right to the district funds to any person or persons, by simply acknowledging that they are debtors to that amount, without its being shewn on what account they became debtors, for they have no discretionary power to bind the inhabitants and funds of the district. If they could be sued on a common count on an account stated, they could be sued on a common count for money lent, or for work and labour.

It should have been averred that an account was stated of certain moneys due by the defendants to the plaintiffs for and by reason of some matter which can by law create a debt from the one to the other, to be satisfied out of the funds of the district.

Besides, as I have already noticed, the first clause of 4 & 5 Victoria, chap. 10, only authorises these Councils "to enter into such contracts "and agreements as may be necessary for the exercise of their corporate "functions." And if they cannot expressly bind themselves except by contracts for such purposes, neither can they do so impliedly.

In this respect they differ from individuals, who can contract to do anything not illegal or immoral, and can make their own estate liable to satisfy any such contracts. (*a*)

In the argument, the defendants' counsel referred to the decisions of this court in the case of *Ireland* v. *Guess et al*, and *Ireland* v. *Noble*, which are only so far in point, that the court held there, as I think we must here, that the action would not lie without the ground of the cause of action being specially shewn; but the cases were different in their circumstances. There the plaintiff, being clerk of a turnpike trust, was suing in his own name upon securities given to other people; with which securities, for all that appeared upon the face of them, he had no

(*a*) The Interpretation Act of Canada (Consol. Stats. Canada, chap. 5, sec. 6, No. 24, p. 30) enacts that words making any association or number of persons, a corporation, or body politic and corporate, shall vest in such corporation certain powers therein described, and "shall also vest in any majority of the members of the corporation the power to bind the others by their acts; and shall exempt the individual members of the corporation from personal liability for its debts, or obligations, or acts, provided they do not contravene the provisions of the act incorporating them."

more to do than any stranger might have. (*a*) If they were securities which had been given to the payees on account of a debt accruing to them in the execution of the law regulating the turnpike trusts, then the statute gave to the plaintiff, as clerk to the trust, authority to sue upon them; but unless that was the case, he had no authority.

It seemed to me in those cases, that upon the plainest principles, the declaration ought to shew that the ground of action was really such that under the statute the plaintiff had authority to sue for it, though he had no apparent privity with the subject matter of contract. So I think also in this case, though not for all the reasons that applied in the cases which I have just referred to.

The declaration, as it regards any claim upon an account stated, is defective in not shewing that the parties accounted together concerning some matter which by law could create a debt between them, for they are not like corporations or individuals acting in their own concerns, at liberty to bind themselves to any extent and for any purpose, and having property of their own, which is by law liable to answer whatever contracts they may choose to make.

They are only authorised to execute the provisions of certain positive laws; and whether they appear as plaintiffs or defendants, they must shew themselves to be acting within those provisions, and with a view to them.

It is to be considered that the 59th clause of the statute 4 & 5 Vic. ch. 10, in classing the different claims upon the district revenues, makes all debts to be assumed by the district council, under the 43rd clause, the third head of charge, and expressly disables the district council from paying such debts out of the district funds till certain other charges have been first provided for.

This seems to impose upon the plaintiffs in an action against the district council for a debt of the description sued for, the necessity of averring and shewing that there are funds in their hands out of which the debt could be paid, after discharging the demands which by law are entitled to preference, because it is only then that the duty to make the payment commences, which is the foundation for the action.

It may be urged, and with reason, that as neither the justices nor the district council of London could, without violating the law, have

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(*a*) The Surrogate Courts Act (chap. 16, Consol. Stats. U. C.) provides (secs. 65 & 82) that bonds given in the Surrogate and former Probate Courts may be assigned on any breach, and may be sued for in the name of the assignee, although such assignee is not named in such bond. See also the Act respecting Arrest and Imprisonment for Debt, chap. 24, sec. 33, as to the assignment of bail bonds and actions thereon by the assignees thereof.

expended more than their proportion of the duties levied in the county of Huron, which the justices had appointed, therefore it must be assumed that the remainder of all such duties is still in the district treasury, and that being there, it forms no part of the funds of that district which can be diverted to any of the charges upon that district which are entitled to preference as regards their own funds. Still, it seems to me, we cannot hold otherwise than that such moneys not paid over do constitute a debt, which under the 43rd clause the district council must be held to have assumed.

The object of this action is to compel them to do so, whether they have still the proper moneys in hand or not, and pursuing their remedy on this broad footing for a debt, as I think the plaintiffs have a right to do, with a view to obtaining satisfaction at all events out of the funds of the district, present or future, it appears to me that thus suing for it and treating it as a debt under the 43rd clause, they should aver that the defendants have funds to pay it after discharging the demands to which the 59th clause gives a preference. (*a*)

If the plaintiffs find it necessary to persevere in their action, they should be allowed to amend their declaration, so as to free it from these and any other exceptions; but surely there can be no necessity for expending the district funds in an unseemly contest between the two districts, when it must be presumed that the only question between them must turn upon some legal doubt, which could be settled either by submitting to the best legal opinion, or by stating a case amicably for the opinion of this court, as the law enables them to do. (*b*)

MACAULAY, J.—I have not been able to satisfy myself that the moneys sought to be recovered in this action, do not constitute a debt due by the London to the Huron District, if there be in point of fact funds available to satisfy the same; or that an action of debt will not lie for

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(*a*) The Consolidated Common School Act, c. 64, s. 51, enacts that each County Council (and, by other sections, City, Town and Village Councils) shall provide for the payment of teachers on or before the 14th December in each year: that the Treasurer shall pay all lawful orders upon him in favor of teachers, whether he be in school funds or not, and that the Council shall make the necessary provision to enable the Treasurer to meet such order from other funds.

(*b*) All such questions must now be settled by arbitration, but the award made is subject to the jurisdiction of the Superior Courts of Law and Equity, and may be made a rule of Court. And in such cases the Court may consider, not only the legality of the award, but the merits as they appear from the evidence and proceedings filed, and may call for additional evidence, and either with or without such evidence set aside the award or remit it again to the arbitrators or to the parties, and fix the time for making the award; or the Court itself may increase or diminish the amount of the award, or modify the award, as the justice of the case may seem to require. (s. 358.)

such moneys, grounded on the duty imposed by the statute upon the one district and its officers, to pay to the other district.

But I think the special counts in the present declaration defective: in the first place, it is not clear in what form of action they are conceived, whether in debt, assumpsit or case; they bear as much resemblance to the last as to either of the former.

The misdescription of the statute seems a valid objection; and I think a notice or demand should be averred. (*a*) The debt sued for existed (if at all) before and upon the proclaiming the county of Huron into a separate district—and upon the first creation of the London District Council. The obligation to pay is not upon any contract entered into by the council, or that existed previously, but it arises out of a duty imposed by law, and although not a debt incurred by contract, it was a debt in law, one however which the defendants were not bound to satisfy until other charges upon the district funds had been previously satisfied.

I apprehend therefore, that not only a notice or demand should be made before action, but that it ought to be averred that the defendants possessed surplus funds applicable to the satisfaction of debts existing on the 1st January, 1842, as provided for under the 3rd head of 4 & 5 Vic. ch. 10, sec. 59, after defraying the charges under the 1st and 2nd heads.

As to the account stated, it would no doubt be better that it should appear to have been in relation to corporation transactions, but I am not prepared to say these two district councils cannot in law account together in relation to such matters.

JONES, J., sitting in the Practice Court during the argument, gave no judgment.

MCLEAN, J., concurred in giving judgment for the defendants on demurrer.

Per Cur.—Judgment for defendants on demurrer to declaration.

(*a*) In addition to the above, the present Municipal Act, c. 54, s. 202 (p. 569) provides that in case a party is entitled to bring an action against a corporation by reason of anything done under a by-law, order, or resolution, which is illegal in whole or in part, no such action shall be brought *until one month after* such by-law, order, or resolution, has been quashed, nor until *one month's notice in writing* of the intention to bring such action has been given to the corporation. See also *Harrison's Municipal Manual*, p. 98.

The Queen v. David John Smith, Treasurer of the Midland District.

Mandamus—Treasurer—Councillor—Incompatible office—Books of Corporation.

At a session in Oct. 1846, A. was elected by the District Council of the Midland District, treasurer of the district; when elected A. was *himself a district councillor*; B. at the time of A.'s election was holding the same office of treasurer to the district, having been long previously appointed to that office by royal commission. A. upon his election requested B. to give him the books, &c., of office. B. refused upon the grounds, that under the District Council Acts 4 & 5 Vic. ch. 10, and 9 Vic. ch. 40, A. had been elected treasurer at a time and session when by law no such election could take place; and that the two offices of district councillor and treasurer were incompatible. Upon B.'s refusal A. applied to the Court for a mandamus to B. to deliver the books, &c.

Held, Per Cur. 1st, that A. had been elected at the proper time and session. 2ndly, that the two offices were incompatible. 3rdly, that A. was ineligible for election, the council having no power to receive his resignation as councillor. 4thly, that notwithstanding A.'s irregular election, he, as the *treasurer de facto*, under the act 9 Vic. c. 40, had a legal right to the books, &c. of his office: and that a mandamus might go to B. for the delivery of the books &c., to A., he being since A.'s election under the act a mere stranger to the office.

In Hilary Term last, the court granted a mandamus *nisi* directed to David John Smith, Esq., late treasurer of the Midland District, commanding him to deliver to the auditors of the Midland District, an account of the moneys received and expended by him as treasurer of the Midland District, during the then last quarter of the year ending 31st December, 1846; and to pay over to William Ferguson, Esquire, treasurer of the Midland District, the balance of such monies, and all other moneys of the Midland District remaining in his hands, and to deliver over to the said William Ferguson all the books and papers in his hands, belonging to the said office of treasurer.

Mr. Smith, the late treasurer, filed his return to this writ on the first day of Easter Term, setting forth in substance, that on the 5th February, 1842, he was appointed treasurer of the Midland District, by commission under the great seal of the province, and gave the security required by law; that he entered upon his said office, and "has continued ever since "to hold the office, and discharge the duties under and by virtue of his "said appointment."

The commission to him was to hold during her Majesty's pleasure, and he stated that he had never been discharged from the office, or received any intimation that it was her Majesty's pleasure that he should hold it no longer; that he had never vacated or resigned his office; and that his surety bonds remain in force against him. That the first meeting of the Municipal Council of the Midland District, held after the passing of the 9th Vic. ch. 40, entitled, "An act to amend the laws "relative to district councils in Upper Canada," was holden at Kingston,

on the 11th day of August, 1846, being the second Tuesday in the month of August; that at that meeting the council did not select by the majority of their votes or otherwise, a person to be treasurer, but adjourned their meeting without doing so; that the second meeting was held on the 6th of October, 1846; that at the township meeting for the township of Pittsburg, held on the first Monday in January, 1846, William Ferguson was duly chosen a councillor for the said township, to serve in the district council for three years, and took his seat, and took and subscribed the oaths according to law; that at the meeting of the district council held on the 6th Oct. 1846, being the second meeting of the district council held after the passing of the statute 9 Vic ch 40, and the fourth after the said William Ferguson had been elected a a member of the district council, and while he was serving and acting as such, two years of the period for which he was serving and acting as such, two years of the period for which he was chosen being yet unexpired, the said William Ferguson was *selected* by a majority of the votes of the district council to be treasurer of the Midland District; that after he had so selected as treasurer, he continued for several days at the said last-mentioned meeting, to vote in the said council, and to act and to take part in their proceeding, namely, on the 7th, 8th and 9th days Oct., 1846.

And the defendant relied upon the facts, that William Ferguson was "selected" not at the first, but at the second meeting of the district council after the passing of the act; and that at the time of his being selected he was a member of the district council, as making his selection or appointment void.

He set out further, that on the 1st January, 1847, he had delivered to the auditors appointed according to law, an account of all the moneys received and expended by him as treasurer, during the quarter ending on 31st December, 1846, and he annexed a copy of such account, which shewed a balance in his hands of 2470*l.* 2*s.* 10*d.* on that day.

This was the substance of the return.

In the affidavits upon which the mandamus was obtained, and in affidavits filed on the other side, other facts were stated which it was supposed might have weight in granting or refusing the writ.

S. B. Harrison, *Q. C.*, *Campbell* and *Burrowes*, moved to quash the return to the mandamus. They referred to the District Council Acts 9 Vic. ch. 40; 4 & 5 Vic. ch. 10; and 4 B. & Ad. 9; 7 B. & C. 643; Dougl. 383, n. 22; 2 T. R. 779; 3 Burr. 1616; 2 T. R. 88; 1 Lord Raymond, 563; 2 ib. 1304; Com. Dig. Franchise, 40; Wilcocks on Corporations, 610, 624.

Hagarty and *McKenzie* shewed cause, and referred to 5 Bing. 180; 4 B. & Ad. 9; 5 A. & E. N. S. 548; 2 A. & E. N. S. 460.

The various points raised in argument by counsel, are fully given in the judgment of the Chief Justice.

ROBINSON, C. J.—We must dispose of the case upon the return. The question is, whether that presents any valid reasons why the late treasurer should not be compelled to surrender up the books and papers belonging to the office of treasurer, and to pay over the balance of the district revenue remaining in his hands.

Mr. Smith urges as his reason, that there has not been a treasurer duly appointed to succeed him; he does not deny that Mr. Ferguson has been in fact chosen by the district council, and is in the actual execution of the duties of the office so far as they can sustain him, neither does he deny that under the new act 9 Vic. ch. 40, the district council had the power to elect a person to fill the office. (I call it an *election*, because the mode of appointment by the votes of the council does in fact amount to that, though for some reason the legislature has chosen to call it by the less common name of a *selection*.)

But it is contended by the late treasurer, that the council have not duly elected a treasurer to succeed him, for that, 1st, they did not elect Mr. Ferguson on the day appointed by the statute; and 2ndly, because Mr. Ferguson being at the time of his election a member of the district council, and serving in that capacity, he was ineligible to the office of treasurer. (*a*)

As to the first reason, the act was passed 9th June, 1846, that is, it was assented to on that day, but by the 21st clause it is provided that the "act shall come into effect upon, from and after the third Monday "in August then next."

The 7th clause enacts, "that at the first meeting of district or muni- "cipal councils after the passing of this act, a district treasurer shall be "selected by the majority of the votes of any district or municipal council, "anything in the 29th section of the former act (4 & 5 Vic. ch. 10,) to "the contrary notwithstanding, and shall be subject to *re-election* at the "expiration of every three years, and at the end of three years the "council, if they shall see fit, may select any other person to be treas- "urer, and that in any vacancy in the office of treasurer, by death or "otherwise, during the recess of the council, the warden may and shall

(*a*) Where the legality of certain proceedings is the subject matter in dispute, he who maintains the legality, and seeks to take advantage of it, cannot rely upon the proceedings as a bar to the opposite party.—*Broom's Legal Maxims*, 4th Ed. p. 167.

"summon an extra meeting of the council, for the purpose of selecting "a treasurer as aforesaid."

The 8th clause enacts, "that any treasurer selected by the provisions "of this act, shall before he enters on the duties of the said office, give "security for the safe keeping and the lawful application of all moneys "which shall come into his hands by virtue of any act of the legislature, "or of any by-laws of the municipal or district councils; such security "to be in certain sums specified, and to be approved of by the council."

This is in substance all that the new act contains, respecting the office of treasurer. (*a*)

The warden and the district clerk, who under the first act had been chosen by the crown, are under this act to be elected by the council.

With regard to the warden it is provided by the 4th section, that the warden who had been appointed by the government for each district, *shall* go out of office, from the time when a warden shall be appointed for such district, under the provisions of this act; and the same is provided respecting the district clerk; but it will be found, that with respect to the *going out of office* of the treasurers who had been holding office under appointments by the governor, nothing is expressly said.

As regards the times of meeting, the 4th & 5th Vic. ch. 10, (sec. 22,) had appointed them to be on the second Tuesdays in February, May, August and November in each year, and to last six days; the last act 9 Vic. ch. 40, repeals this, and appoints but two ordinary meetings in each year, namely, on the first Tuesdays in February and October; each to last for nine days. And the same clause (11) provides that anything which by the said act, 4 & 5 Vic. ch. 10, or the by-laws of any district which without this act (viz., 9 Vic. ch. 40) would have been held in the month of August or of November, shall and may be done at the half-yearly meeting to be held in the month of October in the same year.

I consider it too plain to admit of argument, that the district council could not proceed to elect a treasurer under the new act until it came into force; in other words, not till after the *third Monday in August*, 1846. They could not therefore have legally elected him at any meeting which they might have held, legally or not, on the second Tuesday in August 1846. (*b*) And it is equally plain, I think, that the legislature

(*a*) The appointment and duties of chamberlains and treasurers are now defined in secs. 159–161 of the Consolidated Municipal Act, cap. 54, pp. 559, 560. See also notes to *Harrison's Municipal Manual*, pp. 74, 75.

(*b*) No exercise of a power can be held to be valid, until the instrument (or statute) conferring the right to exercise the power has come into force, and vested the power in the party entitled to its exercise.

intended their new act so far to take effect before the *third Monday* in August, 1846, as to render any quarterly meeting on the second Tuesday of that month unnecessary. But whether, from the imperfect manner in which the statute is framed in this respect, it may have been considered legal and necessary or not to hold a meeting under the old act, on the second Tuesday in August, because the new act, abolishing that arrangement, was not to take effect until the third Monday of that month, it is evident that that meeting must have been held for no sensible purpose; for every thing which they could have done at such a meeting under the old act, must, according to the 11th clause of the new act, have been deferred to the first half-yearly meeting in October following; and whatever there might be to be done under the new act, towards electing a treasurer, could not be done until the authority for such election under the new act came into force, and that could not be in time for any quarterly meeting that it might be supposed necessary to to hold in August, in consequence of the inconsistency between the letter and the intention of the new act.

The election of treasurer, in my opinion, could only be made at the session in October, being the first session after *the act came into force.* The meaning of the act is plain: it was not intended that there should be any regular meeting before October, 1846—though there is an omission in the statute which creates an apparent inconsistency. (*a*)

Then, as to the second point—that Mr. Ferguson, whom the District Council did elect in October, was ineligible—the statute 4 & 5 Vic. chap. 10, sec. 12, provides, "that no person accountable for the district "moneys, nor any person receiving any pecuniary allowance from the "district for his services, shall be qualified to be elected a councillor in "any District Council to be constituted under this act;" (*b*) and in the

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(*a*) The rule by which the courts are to be guided in construing Acts of Parliament, is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary or modify them as to avoid that which it certainly could not have been the intention of the Legislature should be done.—Per Parke, B., in *Perry* v. *Skinner*, 2 M. & W. 471.

(*b*) A similar provision will be found in the Consolidated Municipal Act, cap. 54, sec. 73, which, after declaring certain parties ineligible for election, declares that "no person receiving any allowance from the corporation (except as mayor, warden, reeve, deputy reeve, or township councillor), and no person having, by himself or partner, an interest in any contract with or on behalf of the corporation, shall be qualified to be a member of the council of the corporation." See, on this, the cases cited in note *m* to *Harrison's Municipal Manual*, p. 82, and *York Buildings Company* v. *McKenzie*, 8 Brown's P. C. 42 & 68; *City of Toronto* v. *Bowes*, 4 Grant, 489, 6 Grant, 1; and *Collins* v. *Swindle*, 6 Grant, 282; s. c. 4 U. C. L. J. 42.

14th clause it is provided, that every person duly qualified, who shall be elected a district councillor, shall accept the office or pay a fine of £10. No power to resign the office of district councillor is given by the act.

The treasurers of districts, who had been formerly appointed by the justices of the peace, were by the 29th clause of 4 & 5 Vic. ch. 10, to be appointed by the governor to hold their office *during pleasure;* and he was to be under the control of and accountable to the district councils touching all matters and things within the jurisdiction of the councils.

The 38th clause of 4 & 5 Victoria, ch. 10, enacts that it shall not be lawful for any person to hold at the same time *more than* one of the district offices thereby created; by which I take to be meant the offices of clerk, treasurer, auditors and district surveyor, and perhaps also the warden of the council.

Upon these provisions, and on the general principles of law, it has been argued that the offices of a district councillor and a district treasurer are incompatible.

I think they are, in the first place, on account of the repugnancy and impolicy of the office of treasurer, which is a subordinate and merely ministerial office, held under the council, being in the hands of a member of the council which is to direct and control him.

This would have compelled us, in my opinion, to hold them incompatible, if the statutes referred to had contained no particular indication of the intention of the legislature on that subject. We could not have done otherwise without opposing the decision of the Court of Queen's Bench in England, in the case of the *King* v. *Paterson*, 4 B. & Adol. 9, and the numerous authorities by which it is supported.

But in the next place, I consider that the 4th and 5th Vic. chap. 10, does contain unequivocal indications of the intention of the legislature, that the offices of district councillor and treasurer shall not be held at the same time by the same person.

It would be inconsistent with the provision in the 12th clause. When that was passed, the right of appointment of treasurer was to be thenceforward in the governor; and I conceive if the governor had appointed a district councillor treasurer, such an appointment would have been in opposition to the spirit and intention of the act; and the only question would have been, whether such an appointment being made, the member of the council, by accepting and acting in the office, could be held to have virtually surrendered his office of councillor so that he might there

after hold the office of treasurer alone. If that effect could not be legally held to have followed, then I consider that the consequence must have been, that if he must still continue to hold the office of councillor his appointment of treasurer must have been held to be illegal, as being contrary to the plain intent of the statute, in the clause which I have referred to, that the two offices shall not be in the same hands. It would be absurd to suppose that the legislature could mean to allow a person to be appointed treasurer after he had become councillor, and to continue to hold it with the office of councillor, while they were clearly disabling any one who was holding the treasurership from being chosen to the office of councillor.

It is impossible to hold otherwise than that the offices are incompatible; but the question is not so much upon their incompatibility, as upon the legal consequences of the attempt to place the existing member of the council in the incompatible office.

It has been argued that, by accepting the office of treasurer and acting in it, he may be taken (if the offices are incompatible) to have surrendered or vacated that of district councillor, in which case there can be no legal difficulty in the way of his retaining the other. I do not conceive that to be the effect, but am of opinion that, looking at the provisions of the statute, and considering the reason of the thing, the language of the court in the case which I have already cited, of the *King* v. *Paterson*, would well warrant us in holding that a member of the district council is ineligible to the office of treasurer, inasmuch as it is plain they cannot be lawfully held together; and there is no discretion in the member of the council to avoid his office by his own act of resigning, nor any discretion in the other members of the council, with whom he is serving, and by whom he was not appointed, to accept his resignation. (*a*)

But I content myself with merely expressing this opinion, without entering into arguments to support it; for it is clear to me—taking it to be undoubted that Mr. Ferguson was not eligible when he was chosen, and that the office was therefore not legally conferred upon him, and cannot be holden by him if his title should be brought in question directly and upon a proper proceeding—yet that the late treasurer has nothing to do with the question of his eligibility, or the legality of his election—no more to do with it, at least, than any other inhabitant of the district has. He was to hold his office under his commission during

(*a*) Provisions are made in the present Act for Municipal Councillors resigning their offices.

the Queen's pleasure. The Queen, through her governor, assented afterwards to a statute which introduced a different tenure of office, and a different mode of appointment to it; and this new system was to take the place of the old upon the first occasion of the council meeting under the new act.

They did meet in October last, and proceeded then (at the right time, I think) to elect a treasurer, and they did make an election; from which moment, in my opinion, the new tenure of office and new method of appointment came into force, and the defendant on this appointment ceased to be treasurer and has no more interest in the question than any stranger has.

Taking the ineligibility of Mr. Ferguson to be clear, the strongest effect that could have would be to make the election void, and the office vacant; in which case the 7th clause of the new act would make it the duty of the district council to proceed at once to the election of another treasurer.

The late treasurer's interest in his office was put an end to, the moment the council proceeded to an election under the new law, and their making a void or voidable election, cannot set him up again as a treasurer holding office under the governor's commission. (*a*)

If a district council having made an election illegal on any ground, shall persist in maintaining it, the case is not without remedy upon a proper proceeding instituted for trying the validity of the election, but so long as the person chosen is in the actual discharge of the duties, sworn and admitted into office, and recognized by the district council as the treasurer, there can be no reason which will warrant the late treasurer, who certainly in my opinion is not now treasurer, in refusing to give up the books and papers of the office, and any balance of money remaining in his hands. (*b*)

These are the property of the district—the late treasurer has no ground for retaining them, for he is relieved from responsibility the moment he places them in the hands of the person who, regularly or not, has been appointed by the council to succeed him.

(*a*) Two results were intended from the exercise of the power given the council by the statute: first, to cause the office to be vacated by the former incumbent; secondly, to confer such office legally upon his successor. By the first the former officer became *functus officio*; and by the second a right was conferred upon the inhabitants to test the legality of the election by a proper proceeding in the superior courts.

(*b*) The civil remedy to recover books and papers, and moneys, is by a *mandamus*.

Upon any other principle of proceeding, the public affairs of the district would be exposed to great inconvenience and confusion. (*a*)

If by any disregard of the law, accidental or otherwise, a person has been placed in office, who cannot by law hold it, things must take their due course—the illegality must be ascertained and pronounced upon in a proper proceeding instituted to try the question; and in the meantime, the person whom the district council has actually elected treasurer, and who is treasurer for other purposes, must be treasurer also so far as the custody of the books and documents and moneys is concerned, which are required to be in the office of the treasurer.

I have no doubt, and indeed that was fully admitted in the argument, that the late treasurer has not from any improper motive withheld the delivery of the books and moneys in his hands, but, because he has considered that it was incumbent on him to see that the district council has legally elected his successor.

It is not intimated that the council entertains any dissatisfaction in regard to the late treasurer with respect to the state of his accounts, or any doubt of his ability and readiness to pay over the just balance in his hands when directed to do so.

But in the mean time it is pressed upon us (and we may easily suppose it must be so), that great inconvenience is felt from the refusal of the late treasurer to give up what belongs to the office.

It is necessary I think, that he should do so, for it is not in this indirect manner that the legality of appointments or elections is to be questioned, but by *quo warranto*, or in cases of merely colourable elections, a mandamus to the council to proceed to another election, in which case the person actually filling the office, though under such void and colourable election, must be made a party to the rule, that he may be heard in defence of his right, as in *Rex* v. *Bankes*, 3 Burr. 1452. (*b*)

(*a*) The present Municipal Act provides (sec. 184) that in case any officer of a corporation or other person refuses or fails to deliver up books, &c., or pay over moneys, &c., to the corporation or person authorized to receive them, he shall be deemed guilty of fraudulent embezzlement of the same, and may be prosecuted as a servant fraudulently embezzling the property of his master. The civil remedy, however, is not affected by such proceeding.—See *Harrison's Municipal Manual*, p. 83.

(*b*) By the statute 9 Anne, c. 20, s. 4, it is provided that in case any person shall usurp, intrude upon, or unlawfully hold and execute any of said offices (Mayors, Bailiffs, Portreeves, and other offices in cities and towns, boroughs and places), a *quo warranto* information may be exhibited against them, &c. A *quo warranto* information lies in respect of any office which concerns the public.—*Rex* v. *Boyles*, 2 Ld. Raym. 1559. Where a party is improperly elected, a *quo warranto* is the proper remedy.—*R.* v. *Attwood*, 4 B. & Ad. 481. If the ouster and election be wrongful and has proceeded upon an honest misconstruction of the statute, the proper remedy is by a *quo warranto*.—*R.* v. *Oxford*, 6

But those who had been treasurers under the old law have no more interest in the office than strangers have, from the time that other treasurers have regularly or irregularly been chosen to the office, and it would seem as reasonable in the case of any other void election that the last incumbent should claim a right to resume his duties, as that the late treasurers should withhold the papers of the office till they are satisfied with the legality of the elections of their successors.

In the case of *Milward* v. *Thatcher*, 2 T. R. 81, which in its material features is much like the present—the point of eligibility of a person to the office of town clerk of Hastings, while he was at the same time a jurat of the corporation, was tried upon issues directed by the Court of Queen's Bench—and in that case Mr. Justice Buller, in the course of his judgment, remarks upon the effect of an actual election to an office, however clearly illegal. "Suppose (he says) a person were criminally "convicted in a court of record, and the recorder of such court were "not duly elected, the conviction would still be good in law, he being "the judge *de facto*."

So here the election has undoubtedly had the effect of putting an end to the late treasurer's tenure of office, since it has constituted Mr. Ferguson the treasurer *de facto*.

Till his election has been declared void upon a proper proceeding, all payments made by him will acquit the corporation, and all payments made to him will be binding on the corporation, and acquit the parties paying; and this being so, he surely should be in possession of the books and accounts, and whatever else is necessary for enabling him to act efficiently and with safety to the public.

A. & E. 353. If it was a doubtful election and fit to be tried on information, a *quo warranto* would be the proper remedy. If it was a mere colorable election, and clearly void, a mandamus should go.—*R.* v. *Bankes*, 3 Burr. 1454. In *R.* v. *Colchester*, 2 T. R. 200, there were conflicting claims of candidates, and a mandamus was refused because it was a decisive answer to the application, that there was a remedy by *quo warranto*. Where there is no power in the elective body to assemble and make an election, the proceedings are colorable and clearly void and a mandamus should go.—*R.* v. *Leeds*, 11 A. & E. 517. It is a maxim of corporation law, that if a municipal officer is *bona fide* in possession of an office, the title shall not be tried by mandamus, but the parties questioning his election must proceed against him by information in the nature of a *quo warranto*.—Per Lord Campbell, C. J., in *Reg* v. *Chester*, 2 Jur. N. S. 114. A mandamus could issue only on the supposition that the office has no person holding it. But it is an inflexible rule of corporation law, that unless the election was merely colorable, so that it was void, it is a case of plenarty. Whenever a person is *bona fide* elected by persons having a general authority, and they proceed *bona fide* on a matter which admits of question, their election is not colorable, although there may be a mistake in the time or mode of their proceedings.—Per Coleridge, J., *Ibid.* The court will not grant the rule *Nisi* in the alternative for mandamus or *quo warranto*.—*Reg.* v. *Winchester*, 7 A. & E. 215; *Reg.* v. *Leeds*, 5 Jur. 548; see *Reg.* v. *Phippen*, 7 A. & E. 966.

The case of the *King* v. *Bristow*, 6 T. R. 168, raises a doubt whether we ought to grant a mandamus in this case to a person who had filled the mere ministerial and subordinate office of treasurer, or leave the council to pursue another remedy; (*a*) but we have not felt it necessary to consider that scrupulously, because it was intimated on the argument, that all that was required was an expression of the opinion of the court upon the obligation of Mr. Smith to give up the documents and pay over the moneys, and that it would be readily acquiesced in; and at any rate this remedy in such cases seems not an improper one, for the object desired is a specific one, and it is of importance to the public that it should be speedily and absolutely obtained.

In *Rex* v. *Clapham*, 1 Wils. 305, a mandamus was granted to oblige the old overseer of the poor to deliver over the books of the poor rates to the new overseer, for *per Cur.* "they are public books, and ought to "be delivered over by one overseer to another, that all the parishioners "may have access to them, and the overseer and churchwarden for the "time being ought to have the custody thereof."

MACAULAY, J.—I think the selection of a treasurer was made at the first regular meeting of the district council, under 9 Vic. c. 40, and that although there is an incompatibility in one of the Council holding also the office of treasurer, amounting to a disqualification, because a councillor cannot resign or vacate his seat by the acceptance of an office under the council; still it appears to me that however irregularly a treasurer was selected under the late act, if he gave the securities required by law and was sworn into office, he thereby became treasurer *de facto*, and Mr. Smith's appointment of treasurer thereupon ceased.

Indeed, it is by no means clear that it did not cease by implication upon the first meeting of the council under the statute, although no selection had been made, for the act provides, sec. 7, that in any vacancy in the office of treasurer, by death or otherwise, during the recess of the council, the warden shall call an extra meeting to make a selection, and if not made when by law required, a mandamus might be issued to enforce a compliance with the statute. (*b*)

(*a*) In *Anonymous Case*, 2 Chit. 251, a mandamus to compel delivery of books to vestry clerk was refused, as he may bring trover. A mandamus was granted to compel a treasurer to deposit account books with clerk, under 12 Geo. II., although they contain private memoranda.—*Rex* v. *Payn*, 6 A. & E. 892.

(*b*) A mandamus will be granted to call a meeting and elect for the ensuing year, pursuant to charter.—*Rex* v. *Attwood*, 4 B. & Ad. 481. Where circumstances showed the election to be doubtful, a mandamus was granted to compel the election of wardens, so that the right may be tried.—*Rex* v. *Birmingham*, 7 A. & E. 254. Mandamus directed to select vestry, commanding them to levy a rate where their conduct has been colorable and apparently with intent to evade

There is no provision for continuing the former treasurer till a successor be appointed, and if there were, it appears to me that one was selected, though irregularly.

Had Mr. Ferguson continued to exercise the functions of councillor also, the case would be different from what it is, but he relinquished the councillorship forthwith on accepting the new appointment, and whether regularly or not, a successor has been elected, and fills the office of councillor for the township of Pittsburg. Both offices are not therefore held by the same person, and the want of regularity in his appointment to the treasurership might be rectified by a renewed nomination, were he ousted from that office, or regarded as not in fact filling it, but I think he is treasurer in fact, and entitled to discharge the duties of the office accordingly.

It might be questioned whether the council have not a clear remedy for the money by action, but the mandamus has not been resisted on this ground.—*Rex* v. *Godwin*, Dig. 598, (22); *Milward* v. *Thatcher*, 2 T. R. 81; *Rex* v. *Pateman*, 2 T. R. 777; *Rex* v. *Paterson*, 4 B. & Adol. 9.

McLEAN, J., concurred.

JONES, J., gave no judgment.

Per Cur.—Mandamus ordered. (*a*)

RAMSAY ET AL. v. THE WESTERN DISTRICT COUNCIL.

Municipal Council—Common School Books—Power of Officers to bind Corporation.

The clerk of a district council can only charge the council by such acts as are within the scope of his general authority, or by such as the council either directed beforehand, or afterwards sanctioned, either expressly or by availing themselves of, to their advantage.

The district council have no power to authorise their clerk or agent to make any contract for the purchase of books for the several common schools throughout the district—such a contract "not being necessary for the exercise of their corporate functions."

(Q. B., H. T., 11 Vic.)

Assumpsit for goods sold and delivered to the defendants, and money paid to their use.

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acting.—*Reg.* v. *St. Margaret's*, 8 A. & E. 889. In *Rex* v. *Totness*, a mandamus to compel the corporation to meet for the purpose of removing impropor members, was refused. A mandamus was granted against the clerk of a court of requests (division court) to give up the books and papers of the court on being removed from office.—*In re Lacroix*, R. & H. Dig. 291.

(*a*) As to the cases in which the writ of mandamus has been granted in Upper Canada, see *R. & H. Digest*, 290-293.

This action was brought by the plaintiffs, who are booksellers and stationers, to recover a sum of 60*l.* and upwards, claimed as due from the District Council for school books which one Cowan, while clerk of the District Council, had ordered; and which it was sworn had been read, examined and approved of in the District Council.

The defence was, that the ordering of these books was a personal transaction of the clerk, who had since left the country—that the books were not furnished on the credit of the council, though they had signified to the clerk their approval of such books being procured, on the supposition that they would be acceptable and useful in the common schools.

The nature of the transaction, as between Cowan and the plaintiffs, appeared from correspondence produced on the trial.

It seemed that the Western District Council, in November, 1845, received a report from the District Superintendent of Common Schools, recommending that every encouragement should be afforded towards endeavouring to procure a uniform series of books for schools, *more particularly those published by the plaintiffs at Hamilton and Montreal.* That Cowan did, by letter written soon afterwards and signed by him as Clerk of the Western District Council, order the books in question, and gave the plaintiffs to understand that the council approved of samples which had been inspected by them; and that they had instructed him to give out the books, when they should arrive, to the several applicants, charging costs of transportation to the contingent school fund; and *to remit* to the plaintiffs, as soon as the amount disposed of should render it an object to do so: that the books were sent up to Cowan in December and January; and that in January, Cowan, at the request of the plaintiffs, sent them his promissory note at three months for 50*l.* on account—probably to enable them to procure a discount—but at the same time remarking, that the giving such a note was not contemplated by his order: that Cowan ordered about the same time small supplies of stationery for the use of the District Council, for which the Warden issued his warrant promptly, and the plaintiffs were paid.

There was no evidence, however, except from Cowan's own letters, that he was in fact authorised, either expressly or tacitly, by the District Council to order the school books on their credit, or on any terms; and except the circumstance that in November, 1845, and before the order was given, a report of the District Superintendent of Schools, containing the recommendation above mentioned, was presented to the District Council, and was printed in their minutes by their order, it was not shewn that that report was in any manner acted upon or adopted.

The jury, on this evidence, found a verdict for the defendants, on the ground that they were not liable.

C. Foster moved for a new trial on the law and evidence; he relied upon the sanction which the council undoubtedly gave to the act of their agent Cowan in the purchase of the books, as binding upon the council and making them liable to this action.

S. B. Harrison, Q. C., shewed cause; even supposing the evidence was conclusive, as to the fact of a direct sanction on the part of the council to Cowan's purchase, still the council would not be liable on such a contract, as it is clearly one "not necessary for them to make in "the exercise of their corporate functions;" and therefore not one which under the statute 4 & 5 Vic., ch. 10, the plaintiffs could enforce against the council. The council have no right to pledge the funds of the district for any such purpose, and this the plaintiffs should have considered before entering into the contract.

ROBINSON, C. J.—I am of opinion that the verdict was properly rendered for the defendants, upon the evidence.

Although Mr. Cowan was the clerk, and in that sense the agent of the Council, he could only charge them by such acts as were within the scope of his general authority, or by such as they either directed beforehand, or afterwards sanctioned, either expressly or by availing themselves of such acts to their advantage. (*a*)

Now we must notice judicially, that to select, order, and distribute books to the general common schools throughout the district, is no part of the duty of the District Council by law; and consequently cannot be within the scope of any authority which they can be supposed to have committed to their clerk.

The duty of selecting school books to be used is committed by law to the trustees of the several school districts (7 Vic. chap. 29, sec. 44); and the District Council, so far as I can discover, have nothing to do with it. (*b*)

(*a*) The clerk of a corporation being a public officer acting under a statute, the scope of his authority to bind the corporation must be presumed to be known to all parties dealing with him as the agent of the corporation.—See Municipal Act. A principal is not liable for the acts of his agent out of the scope of his employment.—*Whitmore* v. *Wiltz*, 8 C. & P. 364. To bind one by the act of an agent, evidence must be given of authority to act in the capacity for which the principal is to be made responsible.—*Whitehouse* v. *Abberley*, 1 C. & K. 642. See *Hall* v. *Smith*, 2 Bing. 159; *Duncan* v. *Findlater*, 6 Cl. & F. 894; *Thompson* v. *Mitchell*, 7 Cl. & F. 564.

(*b*) All municipal corporations, by the present Common School Act (Consol. Stat. U. C., c. 64), have the following authority in regard to school books, &c. (1) County Councils, by sec. 52, may raise by assessment moneys for the estab-

There can, therefore, be no implied general authority from the District Council to transact such business. And as to any evidence of a particular direction or sanction, it is not made out conclusively, because there is nothing to shew it but what may be gathered from Mr. Cowan's own letters, which of course cannot make the District Council liable in any matter not within the line of their duty; otherwise, he could without their sanction or knowledge commit the funds of the district by any ill-advised contract into which he might have chosen to enter.

I should not lay stress upon the fact of Cowan having given his promissory note for part of the amount, because there is ground to infer, from all that we see of that transaction, that that was not done for any other purpose than to give to the plaintiffs the convenience of a discount in the interval which must elapse before the books should be disposed of and paid for: still that was a fact to be considered by the jury.

But, besides other grounds peculiar to the case, and admitting (which I am inclined to believe was the case) that the plaintiffs were led by Cowan to suppose, and really did suppose, that they were furnishing the books upon the credit of the District Council, and upon their order; yet I consider that there is this obstacle against the plaintiffs' recovering on any demand of this kind—that the District Council is a public body, created by statute for certain specified purposes, and with certain specified powers; that their control over the district funds is limited, and their power to make contracts is limited, (and that expressly by the first clause of the statute 4 & 5 Vic. chap. 10,) to such contracts as may be necessary for the exercise of their corporate functions; and that it is not every contract which individuals may choose to make with them that can be made the foundation of a charge through them upon the district

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lishment and maintenance of a *county common school library*. (2) Township Councils, by sec. 84, may levy upon the taxable property of a school section such sum as the trustees, as authorized by their constituents, may require, for the purchase of *apparatus and text books for the school, and books for the school library*; and (sec. 37) may levy upon the township such sums as they judge expedient for purchasing *books for a township library*. (3) Cities, towns and villages, by sec. 60, have the same powers as township councils. Trustees of school sections, by sec. 27, No. 4, have authority to do whatever they may judge expedient for procuring *apparatus and text books* for their schools; and by No. 19, for the establishment, &c., of a *school library*. Boards of school trustees in cities, towns and villages, have authority to lay before their council an estimate (sec. 79, No. 11, D. & E.) of the sum they require for procuring *suitable apparatus and text books for their schools* and for the establishment, &c., of *school libraries*, and the council must provide the necessary funds; or the Board may (No. 18) levy and collect the amount themselves. By sec. 120, No. 2, E., the sum of $26,000 per annum is granted for the establishment of school libraries; and by same section D. the sum of $10,000 per annum is granted for furnishing schools with maps and apparatus. These sums are, by sec. 106, No. 4, apportioned by the Chief Superintendent of Education, on the condition of an equal amount being contributed and expended from local sources for the same object.

funds. If such a disbursement as that now in question does not come within the range of their corporate functions, then it must stand on the same ground as any other debt unconnected with those functions; and if the district funds could be made liable to pay this debt merely because the council, contrary to law, or at least without legal authority, chose to incur a liability, then on the same principle they might order arms for the militia, or irregularly interfere in any other department of the public service, and might apply the funds of the district to objects never contemplated by law. (*a*)

Individuals dealing with them are bound to notice the objects and limits of their power; and it is of much consequence that it should be borne in mind that their acts, when beyond the scope of their authority, are nugatory, and cannot pledge the public funds which they are to administer.—10 Jurist, 308. (*b*)

MACAULAY, J.—It was not necessary for the exercise of the corporate functions of the defendants, that they should enter into a contract for the purchase of school books. They are sought to be charged upon an implied promise to pay; and to sanction such a demand against such a corporation, nothing short of the most unequivocal acts of adoption and acceptance would do, and they are not shewn here.

It appears to me the books were ordered by the clerk of the council, and delivered by these plaintiffs, in reliance upon the school fund as the source from which payment was expected. (*c*) This is alluded to in one of the letters in evidence; and however hard the disappointment and loss may be as respects the plaintiffs, I do not see that they have any direct remedy against the defendants.—6 M. & W. 815, *Mayor of Ludlow* v. *Charlton*.

JONES, J., concurred.

Per Cur.—Rule discharged.

(*a*) The Court of Chancery entertains jurisdiction in restraining corporations and public bodies from wrongfully using funds entrusted to them. An injunction may be granted against a corporation, restraining it misappropriating its funds.—*Attorney General* v. *Liverpool*, 1 M. & C. 171; *Attorney General* v. *Belfast*, 4 Ir. Ch. Rep. 119. Also against the Lords of the Treasury, restraining them from doing ministerial act wrongfully.—*Ellis* v. *Earl Grey*, 6 Sim. 214.

(*b*) The case here referred to (*Paine* v. *Guardians of Strand Union*) was the case of a contract not under seal. See also the case of *Reg.* v. *Warwick*, 10 Jur. 962, as to appropriating corporation funds to purposes not within the scope of the corporation—where such appropriation of funds was held illegal.

(*c*) The *Common School fund*, as defined by the present Act (sec. 123), consists of (1) the *legislative grant* apportioned by the Chief Superintendent of Education, and (2) an equal sum raised annually by local assessment by county, city, town and village corporations. No expenses connected with the administration of the school system are to be paid out of the said Common School fund, but such fund must wholly and without diminution be expended in the payment of teachers' salaries, and for no other purpose.

CAMPBELL v. BLACK ET AL. (*a*)

School Trustees—Teacher—Local Superintendent—Pleading.

In an action for wrongfully dismissing the plaintiff, a school-teacher, a plea averring the dismissal of the plaintiff by a third party, authorised by law to do so, is bad, as being an argumentative denial of the wrong complained of.

(Q. B., M. T., 11 Vic.)

Special action on the case for dismissing the plaintiff without cause from his employment as teacher of a school.

Plea. That defendants were duly appointed trustees of the model school for the county of Middlesex. That as such trustees they employed the plaintiff, having previously obtained the approval of Mr. Elliot, the County Superintendent of Common Schools for the county of Middlesex. That in pursuance thereof the plaintiff entered into his employment of teacher, and remained in such office till he was dismissed therefrom by the said Elliot, so being such Superintendent as aforesaid, as it was lawful for the said Elliot to do, by virtue of the power and authority vested in him as Superintendent.

Demurrer. That plea was bad in neither confessing and avoiding nor traversing the dismissal of the plaintiff by the defendants.

ROBINSON, C. J., delivered the judgment of the court.

We consider the plaintiff entitled to judgment on this demurrer, for the plea is only an argumentative denial of the wrong complained of; just as if a defendant, who had been charged with a trespass, should plead that it was another person who did it, without expressly pleading that he was not guilty himself.

If the defence had been that the defendants were bound by law to observe the orders of the Superintendent, that the Superintendent directed them to discharge the plaintiff, and that they did so in compliance with his order, that would have been a plea in confession and avoidance, but whether good or not would have depended on another question, namely, whether his contract with the defendants, if absolute and unconditional, could be so defeated. Such a plea would not have been subject to the objection which has been taken against this, and which we think is fatal, namely, that it neither confesses and avoids, nor traverses the dismissal of the plaintiff by the defendants, which is the gist of the action. (*b*)

Per Cur.—Judgment for plaintiff on demurrer.

(*a*) This case seems to be the conclusion of *Campbell* v. *Elliot et al*, *ante* p. 52. See the notes to that case.

(*b*) By our new rules of pleading, No. 17, it is ordered that "all matters in confession and avoidance shall be pleaded specially as in actions on contract." If the breach or wrongful act be admitted, and the defendant seeks to protect himself from the consequences by other circumstances, he must plead specially. See the cases cited in *Harrison's C. L. P. Acts*, p. 688.

SMALL, CORONER, &c., ON THE RELATION OF WALKER v. BIGGAR.

Municipal election—Mode of proceeding—Quo warranto—Pleading.

At a township meeting the first duty of the meeting is to elect a district councillor, and the town clerk *ex officio* may preside as chairman of the meeting until such councillor be chosen. The court therefore refused, upon an information in the nature of a *quo warranto*, to disturb the seat of a councillor who had been elected by the meeting, though under protest at the time by some of the electors, because the town clerk had insisted upon acting *ex officio* as chairman.

(Q. B., M. T., 12 Vic.)

Information: (*a*) "Be it remembered, that Chas. Coxwell Small, Esq., "coroner and attorney of our sovereign lady the Queen, in the court of "our said lady the Queen before the Queen herself, who for our said "lady the Queen prosecutes in this behalf in his proper person, comes "into the court of our said lady the Queen before the Queen herself at "Toronto, on the 1st day of said Hilary Term, and for our said lady "the Queen at the relation of William Walker, of the township of "Brantford, in the Gore District, Esquire, according to the form of the "statute in such case made and provided, giveth the court here to be "informed and understand, that the District Council of the District of "Gore, in that part of the Province of Canada formerly Upper Canada, "now, are, and have been, since the first Monday in January, which was "in the year of our Lord 1842, a body corporate and politic, in deed, "fact and law, according to a certain act of the said Province, and passed "on the 27th day of August, A.D. 1841, and entitled, 'An act for the "better internal government of that part of this Province which formerly "constituted the Province of Upper Canada, by the establishment of

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(*a*) The obsolete writ of *quo warranto*, whence the information of the present day derives its name, was in the nature of a writ of right from the King against persons who usurped any office, franchise, liberty, or privilege belonging to the Crown—to enquire by what authority (*quo warranto*) they claimed to exercise such office, in order to have the right determined.—2 *Selwyn's N. P.* 1163, 9 *ed.* The issue of the writ is now to a great extent regulated by Stat. 4 & 5 W. & M. c. 18, 9 Anne, c. 20, &c. Informations in the nature of *quo warranto* may be divided into two classes: 1st. Informations by and in the name of the Attorney General *ex officio*, without any relator, and which are filed without leave of the Court, or any recognizance being entered into. 2nd. Informations exhibited by and in the name of the Queen's Coroner and Attorney (commonly called the Master of the Crown Office), at the instance of a relator or relators, which cannot in any case be filed without the previous leave of the Court, nor without a recognizance entered into pursuant to the statute 4 & 5 W. & M. c. 18. The latter class of informations may be divided into—1st. Those relating to corporate offices or franchises of a corporate nature in corporate places. 2nd. All other informations in the nature of *quo warranto* filed at the instance of a relator or relators.—*Cole on Quo Warranto*, 113. In the case of municipal corporations in Upper Canada, the Legislature has provided a more summary way for the trial of contested elections than the old writ; see sections 127-129.

"local or municipal authorities therein.' And that according to the "form of the same act there ought to have been and still ought to be "at the township of Brantford, aforesaid, in the Gore District, aforesaid, "chosen and elected upon the first Monday of the month of January, "A.D. 1846, according to the provisions of the said act, a member of "the said District Council in and for the township of Brantford, in the "said Gore District, and being one of the Townships of the said Gore "District; and that the office of a member of the said District Council "for the said Township of Brantford, ever since the said first Monday "in January, which was in the year of our Lord 1842, hath been and "still is a public office and an office of great trust and pre-eminence "within the said District of Gore, touching the rule and government "of the said District of Gore, and the administration of public justice "therein, that is to say, at the township of Brantford in the district "aforesaid; and that Herbert Biggar, late of the township of Brantford "in the District of Gore, aforesaid, gentleman, on the 10th day of Feb- "ruary, in the ninth year of the reign of our sovereign lady Victoria, "by the grace of God, of the United Kingdom of Great Britain and "Ireland, Queen, Defender of the Faith, at the township of Brantford "aforesaid, in the District of Gore aforesaid, did use and exercise, and "thence continually afterwards to the time of exhibiting this informa- "tion, hath there used and exercised, and still doth there use and exer- "cise, without any legal warrant, royal grant or right whatsoever, the "office of the member of the District Council, in and for the Gore "District, for the said township of Brantford, and for and during "all the time last aforesaid, hath there claimed and still doth claim, "without any legal warrant, royal grant or right whatsoever, to be the "member of the said District Council, in and for the township of Brant- "ford, aforesaid, and to have, use and enjoy all the liberties, privileges "and franchises to the said office belonging and appertaining, which "said office, liberties, privileges and franchises, he the said Herbert "Biggar for and during all the time last aforesaid, upon our said lady "the Queen, without any legal warrant, royal grant or right whatsoever, "hath usurped and still doth usurp, to wit, at the township of Brantford "aforesaid, in the district aforesaid, in contempt of our said lady the "Queen, to the great damage and prejudice of her royal prerogative, and "against her crown and dignity."

"And therefore the said coroner and attorney of our lady the Queen "prayeth the consideration of the court here in the premises, and that "due process of law may be awarded against him the said Herbert "Biggar in this behalf, to make him answer to our said lady the Queen,

"and shew by what authority he claims to have, use and enjoy the office, "liberties, privileges and franchises, aforesaid.

Plea: "And the said Herbert Biggar, by John Cameron his attorney, "comes into court, and having heard the said information read, com- "plains, that under colour of the premises therein contained he is greatly "vexed and that unjustly; and that he does not think our lady the "Queen ought to impeach him by reason of the premises aforesaid, "because he says, that on the first Monday in January, to wit, on the "5th day of January, A.D. 1846, Joseph D. Clement then being the "town clerk for the township of Brantford, in pursuance of the statute "in such case made and provided, convened a meeting of the inhabitant "freeholders and householders of the said township, for the purpose of "electing and choosing a district councillor and other township officers "for the township of Brantford in the said district, for the year of our "Lord 1846, of which said meeting due notice was given by the said "Joseph D. Clement as such town clerk as aforesaid, he being thereunto "lawfully authorized, according to the form of the statute in such case "made and provided; and that thereupon on the said first Monday in "January, to wit, on the said 5th day of January, the said meeting of "the said inhabitant freeholders and householders was duly convened at "the hour of nine of the clock in the forenoon; and the said Joseph D. "Clement, so being the town clerk, as aforesaid, and then presiding "the said meeting, having first duly taken the oath required by the "statute to be taken by the presiding officers at such meetings:

"The inhabitant freeholders and householders of the said township "first proceeded to elect a district councillor for the said township of "Brantford, to serve in the Municipal Council of the Gore District, for "the year of our Lord 1846; and the said Herbert Biggar having been "duly nominated and seconded, and a reasonable time, to wit, three- "quarters of an hour having elapsed, and no poll having in the mean- "time been demanded by any candidate or by any three electors then "present, he, the said Joseph D. Clement so presiding, as aforesaid at "the said meeting, publicly declared the said Herbert Biggar to be duly "elected councillor for the said township of Brantford, in the Municipal "Council of the Gore District, aforesaid:

"By means of which said several premises, he the said Herbert "Biggar having received due notice of his said election and being duly "qualified, afterwards and within the time prescribed by the statute in "that behalf, to wit, on the 8th day of January, in the year last aforesaid, "before Nathan Gage, Esquire, one of the justices of the peace, who had "authorized such election, as aforesaid, took and subscribed the oath of

"allegiance to her Majesty, her heirs and successors, and also a certain "oath of qualification, as is set forth and prescribed by the statute in "such case made and provided. And the said Herbert Biggar after- "wards, to wit, on the day and year last aforesaid, and from thence "continually until the time of exhibiting the said information, became "and was a district councillor for the said township of Brantford, in the "Gore District, aforesaid; and for all the time in the said information "mentioned, by virtue of the said election, used and exercised and still "doth use and exercise the office of district councillor of the said district "for the said township, and still claimed and claims to be such councillor, "and to have, use and enjoy all the liberties, privileges and franchises "to the office of such councillor belonging and appertaining:

"Without this, that he the said Herbert Biggar, the said office, liber- "ties and franchises, hath usurped or doth usurp, as by the said informa- "tion is above supposed, all and singular which said matters and things "he the said Herbert Biggar is ready to verify, as the court shall award."

"Wherefore he prays judgment, and that the said office, liberties, "privileges and franchises by him claimed in form aforesaid, may be "allowed and adjudged to him:

"And that he may be discharged and dismissed by the court hereof "of and from the premises above charged upon him, &c."

Replication: "And the coroner and attorney of our said lady the "Queen, who for our said lady the Queen in this behalf prosecuteth, "having heard the plea of the said Herbert Biggar by him in manner "and form aforesaid above pleaded in bar, for our said lady the Queen "saith, that our said lady the Queen, by reason of anything by the said "Herbert Biggar above in his plea alleged, ought not to be barred from "having her aforesaid information against him the said Herbert Biggar, "because protesting, that the said plea and the matters therein contained, "in manner and form as the same are above pleaded and set forth, are "not sufficient in law, nevertheless for replication thereto saith, that "immediately after the said meeting of inhabitant freeholders and house- "holders was duly convened as in the said plea stated. And while the "said Joseph D. Clement was presiding at the said meeting as town "clerk as in plea stated, and before the nomination or election of the "said Herbert Biggar as district councillor as in the said plea set forth, "and in order that the said meeting might be duly and properly orga- "nized, one David Christie, an inhabitant freeholder and householder of "the said township of Brantford, was duly nominated and seconded to "preside at and to act as chairman at the said meeting, and the said "Joseph D. Clement was then and there requested, by certain inhabitant

"freeholders and householders at the said meeting, to put such nomina-
"tion to said meeting; and the said David Christie would then and
"there have been duly chosen to act as chairman at the said meeting had
"such nomination been received and put, but the said Joseph D. Clement
"so being such town clerk as aforesaid, and so presiding at the said
"meeting as aforesaid, wholly and wrongfully neglected and refused to
"receive or entertain the said nomination of the said David Christie, as
"aforesaid, or to put such nomination to the said meeting or to allow
"the said David Christie or any one else to be put in nomination or
"chosen as chairman of such meeting, as aforesaid, but then and there
"and during all the time of such election for district councillor, as afore-
"said, acted as chairman of such meeting and presided at said election,
"notwithstanding such nomination as aforesaid, and contrary to the
"express desire and wish of the said inhabitant freeholders and house-
"holders at the said meeting, all and singular which said matters and
"things the said coroner and attorney of our lady the Queen (*a*), for
"our said lady the Queen, is ready to verify."

"Wherefore he prays judgment, and that the said Herbert Biggar
"may be convicted of the premises above charged upon him, and may
"be adjudged and excluded of and from the office, privileges and
"franchises aforesaid."

There were other issues taken on the averments in the plea, which were subsequently abandoned.

Demurrer to replication, that the statutes relating to the appointment and duties of town clerk expressly and impliedly provide, that the town clerk shall preside at the meeting to be assembled for the purpose of electing township officers *until* the district councillor be *first* elected.

The pleadings are given at some length, as it is supposed they may be useful to the profession in similar cases. (*b*)

(*a*) Where an information in the nature of a writ of *quo warranto* is asked for on behalf of an individual, it must be exhibited, if allowed, in the name of the Master of the Crown Office; but where, in such a case, the rule *nisi* was to show cause why the Attorney General should not be allowed to file the information, the Court modified the rule in making it absolute, and directed it to issue in the right form. The Attorney General can file an information at any time without the leave of the Court. In other cases, when allowed by the Court, the information is filed in the name of the Queen, by the Master of the Crown Office. —*Reg. ex rel. Hart* v. *Lindsay*, 15 U. C. Q. B. 851.

(*b*) Contested Elections under the Municipal Law, and the issue of writs of *quo warranto* to try the same, are now regulated by the provisions in sections 127-129. In such cases, before the writ issues, it is required: 1st. That the relator or party applying for the writ was either (*a*) a *candidate* or (*b*) *an elector who gave or tendered his vote* at the election complained of. 2nd. That application for the writ be made within six weeks *after the Election*, or one calendar month *after*

G. A. Phillpotts, in support of the *quo warranto*.

J. Lukin Robinson, contra.

The arguments of counsel fully appear in the judgment of the Chief Justice.

ROBINSON, C. J.—When the pleadings in this case were before us last term, we considered that the plea set forth an apparently good election, that the supposed defects in form, which the relator had made the ground of his special demurrer did not exist, and that the defendant was therefore entitled to judgment; but we allowed the relator to amend his pleadings in order that he might, by replying to the plea, bring out those facts on which he relied for shewing the election to be void; we knew what these were from seeing them stated in the affidavits upon which we had granted the information, but they had not been placed upon the record, and in consequence the question, which we understood was to be brought before us for decision upon the information, was concealed from view.

The counsel for the complainant seemed to think then, as he has intimated on the argument of this demurrer, that we could and ought to have assumed upon the record as it stood before us, that the mere fact of the town clerk having presided at the election (though the statute 4 & 5 Vic., ch. 10, sec. 6 & 7, expressly admits of his so presiding,) necessary made the election illegal. But the question intended to be raised was, whether if the inhabitant freeholders shall at the township meeting, before the district councillor is chosen, desire to elect a chairman, and if a person shall be proposed and seconded for that purpose, it is not the indispensable duty of the town clerk to allow the chairman

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acceptance of office. 3. An affidavit showing reasonable grounds for supposing (*a*) that the election was not conducted according to law, or (*b*) that the person declared elected was not duly elected. 4. Relator's recognizance of $200 and two sureties of $100 each, conditioned to prosecute the writ with effect, or to pay the opposite party costs if adjudged to him against the relator. In the case of the appointment of members of the Municipal Council under the statute, the relator may be either (*a*) a member of the Council, or (*b*) an elector of the municipality or ward for which the appointment was made. In *Reg. ex rel. White* v. *Roach*, (18 U. C. Q. B. 215-226) it was held that the mode prescribed by the Municipal Corporations Act for trying a contested election, is intended for the ordinary proceedings by a writ of *quo warranto*, which therefore will not be allowed; and also, that the relator must show clearly that he was himself a candidate or voted at the election. It is not sufficient for him to state that he "protested and voted against" the election of the person chosen. But in *Reg. ex rel. Hart* v. *Lindsay* (18 U. C. Q. B. 51), the Court granted the writ of *quo warranto* to try the right of the deputy reeve of a village to sit and vote in the county council in a case not provided by the Municipal Act. In that case it was held that the reeve of a township being a member of the county council to which the village sent members, had a sufficient interest in the election to question its legality.

to be first chosen, in which case such chairman and he only could preside at the election of a district councillor to be afterwards made.

That question was not raised by the pleadings as they stood before, but it is now raised by the replication to the defendant's plea, and that replication being demurred to, we are to consider whether it is sufficient to destroy the defendant's right.

The replication tenders several issues intended to be distinct answers to the plea, but as no objection has been taken by special demurrer on the ground of duplicity, we need not consider how far the replication is warranted by the course of pleading in cases of *quo warranto*, nor compare it with the pleadings in the case of *Rex* v. *Knight*, 4 T. R. 419, and referring to what is said by Mr. Justice Buller in regard to the qualification of the privilege of replying several matters to the plea. It has not been disputed in the argument, that the election in this case must be determined to be void if it were not held before the officer authorised to hold it; that point indeed seems clear from the case of *Rex* v. *Smart*, 4 Burr. 2241, and other cases.

Then as to the question upon which our decision is expected to turn, I confess it does not appear to me to be one on which we can give a perfectly satisfactory opinion, because the statute 4 & 5 Vic. ch. 10, is as regards this point not quite reconcilable with itself; we have first to consider that it is under the statute of Upper Canada, 1 Vic. ch. 21, that the township meetings are held, and the 2nd clause of that act says, that at every such meeting "*the town clerk shall preside until a chairman* "*be chosen.*" Then comes the District Council Act 4 & 5 Vic., ch. 10, which requires a district councillor or councillors to be elected for each township at the township meetings to be so holden; and at which the clerk (as directed by the former act) "is to preside until a chairman be "chosen." In what manner or at what point of time the question for election of chairman is to be put to the meeting is not expressed, and if it rested wholly on that act we must infer, I think, that the legislature intended the town meeting to be organized by choosing a chairman before it proceeded to business, and the mode of choosing must be by some one of the voters proposing a chairman, and a vote being taken upon it.

Then how does the 4 & 5 Vic., ch. 10, affect the question? The provisions respecting the election of district councillors begin with the fifth clause; that contains nothing which touches the point who is to preside. The sixth clause may seem to do so, indirectly at least, when it directs, that the town clerk shall at the election administer the oath to each voter respecting his identity with the person of the same name

whom he finds entered in the assessment list; but the inference is not a necessary one, that he must therefore be the presiding officer, for he might properly be expected to attend as having the custody of the list, and he might be authorised to administer the oath as acting in aid of the presiding officer, without being such himself. But I notice that the clause gives the town clerk not merely *authority* to *administer* but a discretion to *require* the oath to be taken, and that would certainly seem to afford an argument, that the legislature intended him to be the person holding the election. Then the 7th clause contains the express words on this point which the defendant relies on namely, "that the inhabi-"tants shall at every such meeting *first proceed to the election of a* "*councillor.*" This he contends requires or at least authorises the election to be proceeded in before a chairman is chosen, because, that is to be the first proceeding. It is said on the other side, that nothing more can be reasonably held to be meant by these words, than that the election shall be the first matter of business to be taken up after the meeting shall be fully organized by choosing a chairman. The same clause requires that full lists "shall be kept at the election by the town clerk "or person presiding at the same." This is a recognition that he *may* preside, and not a requisition that he *must*. When we find the legislature using the words *or person presiding*, we might at first conclude that they used them in reference only to the contingency, that before the election should be proceeded in some one might propose a chairman, and that then according to 1 Vic., ch. 21, the clerk would cease to preside, and they did perhaps so intend; but we must consider that by the third clause of that same act it is provided, that if the town clerk shall refuse or neglect to convene a meeting on the regular day, the freeholders may meet of themselves, and in his absence *choose* a chairman, and there is room to contend that the act means nothing more than this, when from such a cause there may be no town clerk at the meeting, the chairman presiding may hold the election.

As to the argument, that the 8th and 9th clauses would seem to be framed with the intention that the town clerk should hold the election, there is only this much force in it, that he, knowing he is to hold the election, could conveniently take the oath before some justice before the election, which a chairman to be yet chosen could not do preparatory to the meeting, because until the householders were assembled it could not be known whom they would choose as chairman; and the construction would be inconvenient which would impose upon him the necessity of immediately taking the oath before a justice, since there might be no justice present. And then when the 9th clause towards the end provides,

"that all justices of the peace residing in the township wherein the "election is held shall, upon being *notified in writing by such person "presiding*, attend at such election, for the purpose of preserving peace "and order thereat," we cannot fail to consider, that while reasonable notice could be conveniently given by the town clerk before the day of meeting, if he were the person intended by the *person presiding*, it would be a very inconvenient provision that should require the notice to be given by a person to be chosen after the inhabitants had assembled, because then delay must be incurred, the parties must be hurried instantly from home upon the summons, and might not be able to reach the place of election until after all occasion for their services in keeping order had ceased.

The 17th and 18th clauses, however, it seems to me, are more material than these to the decision of this question, for in these while the legislature makes provisions for elections to fill up vacancies, which elections are like the others to be made by all the inhabitant freeholders and householders to be assembled for that purpose, and their using no other words that contemplate any other person as presiding, the legislature directs that the town clerk and no one else shall hold the election.

One can imagine no good reason for the election being absolutely committed to the town clerk as the presiding officer on these occasions more than on others; and when this consideration is coupled with the authority given to the town clerk in the 6th clause, to require any voters to be sworn, there seems certainly much reason for believing that the legislature intended the town clerk, when he was present holding a town meeting, to proceed first to the election of a councillor; and that where they use in the 7th and 8th clauses the words "or person presiding" they may have done so merely from the recollection that the statute 1 Vic., ch. 21, had authorised and directed, that when the town clerk refused or neglected to call the annual meeting, the inhabitants might nevertheless assemble, appoint a chairman and go on with the business. In any such case there would be no person but the chairman presiding at the meeting to hold the election, and that supplies a sufficient reason for the legislature having used the double form of expression. If that be the reasonable construction then the course would be, that according to the 7th clause of the District Council Act, "*the inhabitants should first "proceed to the election of a district councillor*" which would satisfy that clause; and then that the town clerk would continue to preside until a chairman be chosen, which would comply with the 2nd clause of 1st Vic., ch. 21. If, on the other hand, so soon as the inhabitants are assembled under the 1st Vic., ch. 21, it is competent to them to choose

a chairman notwithstanding the 7th clause of the District Council Act directs that they shall first proceed to the election of a councillor, then there was a right to insist in this case, that the motion to appoint a chairman should be put and decided upon, and the person who might be chosen would be the officer to hold the election and not the town clerk. The legislature would have left no room for doubt on the point if they had said, that the freeholders should at every such meeting proceed to the election of a councillor before entering on any other business, except the appointment of a chairman when that should be desired by them.

It is necessary for us, however, now to decide upon the act as it stands, and though we thought it proper to grant the information in order that the question might be fully discussed and placed upon record; and though when we did grant it, it was with a strong impression in my own mind, that the proceeding with the election before a chairman was chosen, when a person had been proposed and seconded to fill the office of chairman, was irregular, yet now having maturely examined the act, and considered the effect of all the provisions bearing on the question, I do not feel warranted in adjudging that the defendant has usurped the office. Before we could so pronounce we must find the point clear of doubt; but it seems to me, that the arguments upon the face of the statute in favor of the election being held by the town clerk are stronger than those on the other side. The District Council Act, as being the last enactment, will of course prevail over anything contained in the 1 Vic., ch. 21, in any respect where it is evidently inconsistent with it, and when we see it there provided, that the inhabitants shall at their meeting first proceed to the election of a councillor, there is no difficulty in saying that that will admit of the election being proceeded in, before the election of a chairman or any other matter whatever, if it shall seem to have been so intended. There is more, I think, to shew that to be the intention than the contrary; and there is this further consideration, that I believe if it were proposed to the legislature as a question, whether they would think it more expedient as regarded the peaceful conduct of the election for a district councillor, and the assurance of an equal chance to all parties, that a known officer should preside who had nothing more to do with that election than other matters, or that that side which happened to muster the strongest on the ground, probably with a view to that election and animated by political or party feeling, should begin by putting one of their own number in the chair to act as moderator between them, they would declare in favour of the former course.

The statute does, I think, afford a good deal of evidence that such

was the intention, or why should it be provided, that the town clerk might require any of the voters to be sworn, when his interposing for that purpose would seem an inconvenient and officious intermeddling if he were not to be the person presiding at the election. In my opinion our judgment should be for the defendant on the demurrer on the ground on which it has been argued.

MACAULAY, J.—Upon consideration, and taking the acts together as *in pari materiâ*, I am disposed to think that (although not expressly so declared) the legislature intended that the clerk should be *ex officio* returning officer, as it were, in the election of district councillors for their respective townships.

The 5th and 7th, 17th and 18th sections strongly indicate this intention, and import that the clerk was to officiate when present. In the event of his absence some other person might be appointed to preside, but there are reasons why it might be deemed more expedient, that the clerk should preside and proceed at once to the election of a councillor, rather than that a contest should previously arise who should be chairman.

The assembly, strictly speaking, would be organized as a meeting when the clerk took the chair, which he must do even for the election of a chairman, and when organized the act seems to say, that the meeting shall first proceed to the election of a councillor. Considering the period of time allowed for taking a poll, the power to require and administer the oath to the voters, the person who is to receive the lists, the importance of proceeding promptly with the election, which must precede all the other business for which the meeting is convened, the supposed indifference of the clerk of the preceding year in comparison with a chairman appointed on the spot by a majority of the electors then present, possibly after a contest between opposing nominees, with other considerations, induces me to believe, that we best give effect to the intention of the legislature (though imperfectly expressed) in holding the present election regular.

No doubt the clerk might preside with the assent of the meeting; the only question is, whether he has a right to do so by first proceeding to the election of a councillor before calling for the appointment of a chairman, and although others may propose to appoint one to officiate in his stead. Upon the whole I think it better to hold that he may do so. To whom would the mandamus go to hold an election, if neglected or omitted by the clerk on the meeting of the first Monday in January?

JONES, J., and MCLEAN, J., concurred.

Per Cur.—Judgment in favour of the demurrer.

Regina v. Gore District Council.

Mandamus—Right to apply for Salary of Warden—By-law.

Semble, that under the Acts 4 & 5 Vic., ch. 10, and 9 Vic., ch. 40, the warden of a district council may be granted by the council a salary as warden.

Semble also, that this salary, if granted, must be by a *by-law* regularly passed, and not by a vote or resolution merely.

Upon an application by *two members* of the Municipal Council of the district of Gore for a mandamus to the warden, commanding him to repay to the treasurer of the district, a sum of money he had received from the council as a salary for his services as warden: *Held per Cur.*, that the mandamus must be refused, the parties applying having no particular interest in the matter.

(Q. B., T. T., 12 Vic.)

Cameron, Q. C., obtained a rule upon the Warden of the Municipal Council of the District of Gore, to shew cause why a writ of mandamus should not issue to him, commanding him to repay to the Treasurer of the District of Gore, the sum of 100*l.* illegally received by him as a salary, under a resolution of the municipal council, passed on the 4th of November, 1847.

The rule was moved on affidavits made by two members of the municipal council, setting forth—that they were inhabitant freeholders of the district, and duly qualified to sit as members of the council and to vote at the election of members—that the resolution in question was passed by the council in the following terms: "Resolved, that the treasurer be "authorized to pay over to the warden the sum of 100*l.*, to meet his "contingent expenses for the current year in attending to the duties of "his office, which had been so efficiently and faithfully performed with "great credit to himself and advantage to the district"—that they protested against the passing of the resolution as being illegal, but that the treasurer paid the sum to the warden—that they did afterwards call upon the warden to refund the same to the treasurer, which he refused to do.

Mr. Cameron referred to the several clauses of the acts 4 & 5 Vic., ch. 10, and 9 Vic., ch. 40, bearing upon the application; and cited 4 A. & E. 286.

P. Vankoughnet and *M. Vankoughnet*, of Hamilton, shewed cause against the application, and cited 5 T. R. 550; 1 P. & D. 75; 1 A. & E., N. S., 288; 6 A. & E., N. S., 70; 10 Jur. 981; 4 Bligh. N. S. 313; 7 Bling. 1; 4 B. & A. 781; 3 B. & Ad. 125; 13 L. J. 107, Q. B.; 8 Jur. 213; 7 Jur. 373.

Robinson, C. J.—I am of opinion that we cannot properly interfere in this case by mandamus upon the application of parties, neither having any particular interest in the matter, nor standing in a position which

makes it in any especial manner their duty to see that what is right is done.

Upon that point the case of *The Queen* v. *Frost*, 1 P. & D. 79, is an authority for holding that such an application can only be made by some properly authorized party.

For this reason alone we should be obliged to refuse the writ on these affidavits. If, in paying away the funds of the district in the manner complained of, the members of the district council were guilty of malversation in their office, they may be found to be subject to prosecution by information or indictment. (*a*)

But, for my own part, though it is not necessary to determine the point, and I shall therefore give no opinion at present which I shall not be at liberty to depart from, if the same question should hereafter come before us in such a manner as to make it necessary to decide it; yet I have no objection to say that it appears to me to be a reasonable and not an improper construction of the 39th clause of the 4th and 5th Vic., ch. 10, to hold that the warden to be appointed under the 3rd and 4th clauses of that act, was a *district officer* within the 39th clause, to whom a salary or other remuneration might be assigned by the district council, under the authority of that clause. He could not come within the 50th clause, which prohibits the giving any allowance to a councillor, because he could not be a councillor so long as that act was in force.

I see nothing else in the first statute, 4 & 5 Vic., ch. 10, which bears upon the question.

Then does the late act, 9 Vic., ch. 40, furnish a clear ground for holding that if a salary might have been legally given by the district council to the warden before the passing of that statute, yet that none can now be legally given? It does not strike me at the present that we could hold that. The latter statute, it is true, no longer leaves the warden to be appointed by the government, but makes the office elective and empowers the councillors to choose one of their own number to be warden.

We can therefore no longer say that he is *appointed under authority of the 4th and 5th Vic., ch.* 10, and so he does not literally come under that head of the 39th clause of that act, which respects salaries *to district officers* to be appointed under *the authority of that act;* but I ap-

(*a*) The Court of Chancery would also have a right to interfere. The funds of Municipalities are trust funds, over which the Court of Chancery has jurisdiction to see that they are faithfully applied.—*Attorney General* v. *Aspinwall*, 2 M. & C. 622.

prehend it would be too narrow a construction which should hold that under that 89th clause no salary could be given to the warden, merely because he is now appointed not under that statute alone, but under an act altering and *amending* it.

The two acts must now (for such a purpose at least) be taken together as one statute, and we should look at the warden as an officer appointed under the first act, which creates the office, amended as it has been by the act of 9 Vic. The office, its powers and duties, still depend on the former act—it is only the mode of appointing the individual to it that is altered. The 6th clause of the 9th Vic., assists this construction materially.

The next question is, whether the 50th clause of the 4th & 5th Vic., ch. 10, has the effect of disabling the warden from receiving any emolument from his office? At present, I should say not. For a salary given to him as warden would not be a salary "for services *as councillor*, nor by *reason of his being such councillor*, but by reason of his being warden; as the speaker in a provincial assembly usually received a salary, when, as a member of the assembly, he was not authorised to received any wages." The 3rd clause of the latter act applies merely, I think, to councillors, and not to the warden, any further than respects his office of councillor.

Then it would be necessary to determine whether, if a salary or other remuneration could be granted by the district council to the warden, it must be granted by a by-law regularly passed; and not as has been done in this case, by a vote or resolution merely. And my opinion at present is, that they can grant the money for such a purpose by by-law only, which must, like other by-laws, be sanctioned by the government.

DRAPER, J.—This rule must be discharged, for there is clearly no case for a mandamus, and there are defects in the application also. In that respect I concur in the opinion delivered by the Chief Justice.—1 Per. & Dav. 79.

I have also a very strong opinion that the only proper and legal mode of appropriating monies belonging to the district is by by-law, and that a resolution only is no sufficient warrant or authority to discharge the treasurer; and that the district auditors would only be doing their duty to disallow any such payment made by him, and not sanctioned by a by-law.

I express no opinion as to the power of the district council to pass a by-law for the purpose contemplated in this resolution, or to give the warden a salary. Admitting, however, that they have the power and

may exercise it, subject to disallowance of their by-law by the executive government, it is a reason, *a fortiori*, why they should not do it by resolution. Such a course would be a manifest evasion of the controlling power over their by-laws given by the 47th sec., 4 & 5 Vic., ch. 10.

MACAULAY, J., and MCLEAN, J., concurred.

Per Cur.—Mandamus refused. (*a*)

BABY v. BABY.

Assessment Rolls.—Clerk of the Peace—Clerk of Council.—Remuneration.

Held per Cur, that under the authority of the 4th & 5th Vic., ch. 10, District Councils may pass by-laws providing that the assessment rolls and statute labor lists, formerly prepared by the *Clerks of the Peace*, shall in future be prepared by the *Clerks of District Councils*, and that they be remunerated therefor.

Semble, however that the Councils may, if they think proper, still allow these duties to be performed by the Clerks of the Peace—in which case, they will be entitled to the compensation.

(Q. B., T. T., 12 Vic.)

In this case, the question submitted for the judgment of the court was, whether the statute 4 & 5 Vic. ch. 10, gave authority to the District Council of the Western District, to pass a By-law providing that the assessment rolls and statute labor lists, formerly prepared by the *Clerk of the Peace*, should, for the future, be prepared by the *Clerk of the District Council*, and compensation be given to the said Clerk for rendering the service.

The arguments of counsel, *Cameron* Q. C. and *Burns*, are fully stated in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

(*a*) It is provided by the present Municipal Act, that "in case the remuneration of any of the officers of the municipality has not been settled by the act of the Legislature, the council shall settle the same, and the council shall provide for the payment of all municipal officers, whether the remuneration is settled by statute or by by-laws of the council" (Consol. Stat. U. C., p. 561, cap. 54, sec. 173). Under a power to remunerate all "Township *officers*," it was held that municipal councillors had no authority to remunerate themselves (*In re Wright and The Municipal Council of the Township of Cornwall*, 9 U. C. Q. B. 442, *Daniels* v. *The Municipal Council of the Township of Burford*, 10 U. C. Q. B. 478). It is now, however, in express terms provided, that "the council of every township and county may pass by-laws for paying the members of the council for their attendance in council, at a rate not exceeding $1.50 per diem" (Consol. Stat. U. C., p. 591, cap. 54, sec. 269). This power is limited to payment for attendance. There is no power to remunerate members for travelling expenses *Patterson and The County of Grey*, 18 U. C. Q. B. 189).

In our opinion, the statute 4 & 5 Vic. c. 10, gave authority to the District Council of the Western District to pass such a By-law as they did pass on the 16th May, 1842, so far as the said by-law relates to the services which had before been required by law to be rendered by the Clerk of the Peace, in regard to assessment rolls and statute labor lists; that by-law having provided that the services therein mentioned in regard to such rolls and lists, which were formerly rendered by the Clerks of the Peace, shall in future be rendered by the Clerks of the District Councils, it follows of course, that the Clerks of the Peace can no longer charge for services which they are not required to render, and for which services the by-law provides; and that the Clerk of the District Council is to be compensated.

The Council might, if they had chosen, have allowed the matter to remain on its former footing, and then the Clerk of the Peace continuing still to perform the duties, might have claimed the compensation which the law allows for them.

This was the impression which the Judges of this court derived from examining the District Council Act, when they were framing under a late Act of the Legislature, a table of fees to be received by certain District officers, including the Clerk of the Peace; for although, in the schedule of fees, we allowed to the Clerk of the Peace certain fees for extending the rates in the assessors' rolls, we were careful to add "where "the service is necessary and the District Council have not provided by "their by-laws for its being otherwise performed," which qualification shewed our opinion then to be, that the District Council might in their discretion make such regulations as would transfer the duties from the Clerk of the Peace to their own clerk.

There might indeed be ground for arguing that even without any specific regulation of the kind—and if the District Council Act had been entirely silent on that point—still the other provisions contained in the statute respecting the imposing and levying rates and assessments would have had that effect; for if the Clerk of the Peace, as the Clerk of the Justices in Sessions, was the proper officer to carry into effect the orders of the Quarter Sessions in regard to the amount of rate to be levied, the same principle would point the Clerk of the District Council as the proper officer for carrying out the orders of the District Council, after the authority to impose rates, and the power to superintend their collection, had been transferred from the Justices to that body. (a)

(a) Under the present arrangement, the Clerk of the Peace is a legal functionary entrusted with various duties relating to the administration of justice, and his office is entirely separated from those duties which belong to the local municipal institutions of the Province.

But the District Council Act is not silent on the point, for after giving power to the District Councils to make by-laws "for providing means for "defraying the expenses connected with the administration of justice," for "providing a reasonable allowance for the support of schools," for "establishing a rate of commutation to be paid by each person bound "to perform statute labor," and "for the collection of, and accounting "for all tolls, rates and assessments imposed or raised under the authority "of any such Council, and of the revenues belonging to such Districts "respectively," and for any other purpose, matter or thing which shall "be specially subjected to the direction and control of the District Councils by any Act of the Legislature of this Province," the Act proceeds to provide, that "all salaries, wages and allowances of any kind "now granted to the Clerk of the Peace for any services performed with "regard to matters hereby placed under the control of the District "Council, shall remain in force and effect, until it be otherwise ordered "by a by-law of the District Council." And the 45, 51, 54, 57, 60, and 62nd clauses, being read in connection with this clause shew clearly enough the intention of the District Council Act to be, that until the District Council should provide otherwise by their by-law, all District officers who had certain duties imposed on them by law for the collection and paying over of the rates to be levied in each district, and certain fees allowed them for the performance of those duties, should be bound to render the same services and be entitled to receive the same fees for such services, in respect to the rates and assessments, although they were to be thenceforward levied under the authority of the Council, but that the District Council should have full authority to make by their by-laws such regulations as they might think expedient, for the collection of the assessments.

It is impossible that we could hold on any principle, that a by-law which makes it the duty of their own Clerk to carry into effect their own orders, is one not within their authority to pass; for it is the most reasonable, consistent, and convenient arrangement which they could make; and the probability that they would transfer such duties from the Clerk of the Peace to the Clerk of the Council, seems to be plainly contemplated in the Act itself.

The only appearance of any room for doubt on this point, may seem to be afforded by the consideration, that in what relates to the administration of justice, the District Council is confined in its powers; and the jurisdiction and authority over such matters, is in general carefully reserved to the Justices of the Peace, but this distinction though it extends to the application of such portion of the rates as may be required for

those purposes, does not extend to the imposing or collecting the rates, for that is clearly to proceed under the authority and direction of the Council. The rates are all to be collected at one time, under one roll, and by one authority, and they all go into one treasury.

It would be absurd to suppose that the Legislature could have meant that, because after their collection an undefined portion of them was to be applicable to the payment of charges over which the District Council were to have no control, but the Justices only—therefore there was to be a double machinery for carrying into effect the orders of the District Council for collecting the rates; and that after the Clerk of the District Council had extended the rolls an account of the clear authority and control which the District Council has in all respects as regarded the general purposes for which the revenue is required, the Clerk of the Peace should go through the idle and unnecessary duty of giving the very same direction, and making the same calculations, because part of the rates when collected, will be applicable by order of the Justices alone.

. There can be no separation of the amount of rate into two parts, one of which should be extended by the one clerk, and the other by the other, because the respective amounts are undefined and unknown.—To pay the Clerk of the Peace for doing the same duty that has already been rendered by the other clerk, would be absurd; and to pay him the fee when he no longer does the duty, would be equally unreasonable.

The argument drawn from the fourth head of the 27th clause of the School Act, 9 Vic. ch. 20, though no doubt applicable, is not conclusive, for that clause only shews that the Legislature either at the moment omitted to consider that the duty of placing the rates on the Collectors' rolls might be transferred to other hands by the District Councils, or they assumed that the Councils had left the former arrangements undisturbed—they could only have meant that the officer who directed the other rates should also direct as regards the school rates. (*a*)

(*a*) The collection of school rates is now made by the Trustees of local Councils in the same manner as other rates. Where Trustees levy they must be guided by the Assessor or Collector's roll; and their collector has the same power, by virtue of a warrant signed by a majority of the Trustees, and proceeds in the same way as an ordinary collector of township municipal rates.

JUSTICES OF HURON DISTRICT v. HURON DISTRICT COUNCIL.

Mandamus—Building Court House.

The Court refused a rule nisi for a mandamus, at the instance of the Justices of the Huron District to compel the Huron District Council, to build a court house.

(Q. B., M. T., 12 Vic.)

In this case a rule nisi was moved for against the district council of the District of Huron, by *Morrison*, to shew cause why a mandamus should not issue ordering them to pass a by-law for building a court house for the district, and to impose a rate for defraying the expense of building the same, and to levy, collect and apply the rate for the purpose aforesaid. (*a*)

ROBINSON, C. J., delivered the judgment of the court.

The application is made to us by the Justices of the Peace of the district, or by the Clerk of the Peace at their instance, and it is represented to us, that there has never been, and is not now any court house in the District of Huron, nor any accommodation for the courts of justice to be held therein, except a room in the upper part of the gaol, intended to be the chapel for the prisoners, but which has been hitherto allowed to be occupied and used as a court room, under the expectation that before this time a suitable court house would have been provided as in other districts.

It is not only that the place thus temporarily occupied is very unfit for the purpose as regards the approaches to it, and in other respects, but it is complained, and we have no doubt with good reason, that the making such use of an apartment assigned for other purposes interferes materially with the internal economy of the gaol, and really renders it very insecure for the safe custody of prisoners, on account of the access which is unavoidably afforded to all persons during the sitting of the courts, and the opportunities which by the arrangements of the building are thus open to strangers to communicate with the prisoners. The sheriff confirms this statement, and declares that he cannot be responsible for the safe keeping of the prisoners under such disadvantages.

This, it seems, has been repeatedly and earnestly pressed on the consideration of the district council, but without gaining their attention in any degree till very lately, when they contented themselves with answering to the effect that they are sensible of the inconveniences represented, but that in the present state of the finances of the district and

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(*a*) Under the present Municipal system, no new municipality is set off until after suitable accommodation for a gaol and court-house has been provided.

the great necessity there is for good roads, they cannot at present do anything for removing them.

It is shewn that the District of Huron contains more than 20,000 inhabitants, and enjoys a revenue of scarcely less than 5000*l.* per annum; such at least is what the documents before us assert.

If other districts in the province less opulent and less extensive had waited until all their roads were made good by means of the district rates, before they erected their court house, two or three generations might have passed away before any attention was given to a public want which is now respectably supplied in every other district except the district of Huron; and we cannot avoid saying, that the fact of the district council having apparently so little difficulty in making up their minds to postpone indefinitely the providing suitable accommodation for the courts of justice, does seem to argue an insensibility to a great public want, which is much to be regretted.

On the other hand, it is not with a good grace that the Justices apply to this court for a writ of mandamus to compel them to do what is required.

The statute 1 Vic. ch. 26, had provided properly for the erection of a gaol and court house, and contemplated their being erected and completed before the county of Huron should enjoy the privilege of being a separate district. It authorised the Justices of the Peace to borrow 6000*l.* on the credit of the county rates, and gave them power to collect additional rates for securing and liquidating the debt. It gave them in short, authority to use, and the legislature expected them to use, the same means by which all other districts have been enabled to provide proper gaols and court houses. Instead, however, of borrowing 6000*l.*, the justices, as they tell us, borrowed but 3100*l.*; they raised no additional rates for this indispensable public object, though all other districts have been content to assume an additional burthen for similar purposes; they suffered the County of Huron to become a district, contrary to the plain intention of the statute, when that had not been done which the law required should be done before it could be separated from the District of London, and they now call upon this court to place the district council in contempt (for that must be the end of a proceeding by mandamus, if compulsion should become necessary) for not doing that under a general sense of duty, and without having the means specially placed in their hands for the purpose, which the justices themselves omitted to do when it was plainly made their duty by a positive law, and a law which gave them certain and sufficient means of performing the duty.

They seem too, if I rightly understand the representations made in

the papers filed before us by the Clerk of the Peace, to have omitted carrying the act into effect not from mere inattention, but from a deliberate and avowed design to avoid imposing upon the population the rate which the law intended them to bear, and which the inhabitants of all other districts have been content to bear; and in the expectation, which does not, I confess, seem a very fair one, that, if they could obtain (as they state they have done) a loan from the Canada Company of some inadequate portion of the £000*l.*, means might be found of saving the district from the charge altogether, by taxing the lands of the Company and obtaining by that means a fund to repay the loan which the company might consent to make to the district.

The consequence of this rather singular way of carrying into effect the statute 1 Vic. c. 26, has been to leave the district for many years without those advantages which the justices now so earnestly represent the want of; and this court is asked to remedy the evil, by applying coercive measures to the District Council.

Before we could properly do that, however, (supposing no room to exist for legal doubts as to the application of such a remedy to such a case) we should feel it just and expedient to offer an opportunity for the council themselves, or for the justices, or the inhabitants of the district, to petition the legislature for such authority as may be found wanting for attaining the object promptly and effectually. (*a*)

The justices under 1 Vic. ch. 26, had express power to impose additional rates for this specific purpose. The District Council are not invested with any such special authority; and though the 39th and 59th clauses of the District Council Act, do give the council a general and discretionary control over matters relating to the safe custody of prisoners and the administration of justice, such as would enable them to build or repair the gaol or court house, if they have the means; yet we know that their authority to impose taxes is not unlimited, and that they may not have, or be able under the existing authority, to raise the funds for doing what we are asked to compel them to do. They might only be able to raise a fund for the purpose by contracting a loan (if that were

(*a*) By the present act, the Reeves and Deputy Reeves of the junior county desiring separation are constituted a provisional corporation, with power to acquire the necessary property at the county town of such junior county, on which to erect a court house and gaol in conformity with the statutory or other rules and regulations respecting such buildings. After such court house and gaol have been provided, the junior county may enter into an agreement with the senior county in regard to the proportion of the counties' debt to be borne by each; and when the same is ascertained, the Governor may appoint the county officers, and issue his proclamation dissolving the union, and erect the junior county into a separate municipality.

legally in their power) and it might not perhaps be found easy to raise in the District of Huron a loan, with the prospect of repayment by imposing a tax on the property of the lender.

Independently of the propriety, as we think, of allowing opportunity for an application to the legislature before interfering by mandamus, there art several legal questions upon which we should have first to satisfy ourselves, and into which we do not think it necessary to enter.

The District Council is a corporate body with considerable discretionary powers, and without going further into the matter, we are not prepared to hold that a proceeding by mandamus and afterwards by attachment against them is the proper course for insuring the erection of a court house. (a)

Per Cur.—Rule refused.

DOE UPPER ET AL V. EDWARDS ET AL.

Sale of land for taxes.—Treasurer's Return.—Taxes paid.

The Surveyor-General made a return to the treasurer of the London District, headed thus: "Township of Dorchester, Southern Division, broken front "Concession A. & B.—South part to John Reilly, jun, 100 acres; north "part to Dudley McPhee, 200;" thus returning the 200 as the north part of broken front Concession A. & B., treating it as one tract, and not distinguishing how much was in Concession A., and how much in B. The treasurer did not open his account in accordance with the Surveyor-General's return, charging the assessment against "the north part of 22, in broken front Concession A. and B., 200 acres; but of his own accord opened a separate account against "north half of lot 22, in broken front B. 100 acres," and returned it as in arrear for taxes, upon which return it was sold. It was admitted that if the assessment had been charged against the 200 acres, as returned by the Surveyor-General, there had been always ample distress upon the premises; and it was proved at the trial, that the parties who had paid taxes on the lot having a title to the whole lot of 200 acres, had paid taxes on the whole 200 acres, and not separately on any part of it; *Held, per Cur.*. that under these circumstances, the sale of the north half of lot 22 in broken front B., 100 acres, was illegal and void, on two grounds: 1st, because it appeared that, notwithstanding the return made by the treasurer, there was no arrear in fact of taxes subjecting the land to sale; and 2ndly, because at the time of sale, there was a sufficient distress on the premises.

(Q. B., H. T., 10 Vic.)

Ejectment for north half of lot 22, Con. B., in South Dorchester.

The lessors of the plaintiff claimed under a sale of land for taxes.

In 1802, the crown granted to one McPhee, the north half of lot 22, in front of the 1st concession, and the broken lot 22 in front thereof, 200 acres.

The Surveyor-General's return, made to the treasurer of the District of London, was headed thus: "Township of Dorchester, Southern

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(a) See note *a*, page 72, *ante*.

Division, broken front concessions A. and B.—south part to John Reilly, jr., 100 acres, north part to Dudley McPhee, 200 acres;" thus returning this land as the north part of broken front concession A. and B. containing 200 acres, treating it as one tract, and not distinguishing how much land was in concession A., and how much in B.

The treasurer did not open his account in accordance with the Surveyor-General's return, charging the assessment against "the north part of lot 22, in broken front concessions A. and B., 200 acres," but of his own accord, it would appear, opened a separate account against "north half of lot 22, in broken front B., 100 acres." It was not shewn that he had any official authority for assuming that what the Surveyor-General had returned to him as the north part of 22, in concession B., was the exact half, or that it contained 100 acres. He kept his account open against it, however, as a distinct tract from concession A., and returned it as being in arrear for taxes nine years up to 1st July, 1829, and in consequence, a sale took place, 1st May, 1830, and forty-five acres of the north half of lot 22, in concession B., was sold to one of the lessors of the plaintiff, Upper, for 2*l.* 4*s.* 2*d.*, the arrear of taxes and fees; and the other lessor of the plaintiff, Niles, held by title derived from him.

The two hundred acres granted by the patent to McPhee, as the north part of lot 22, in broken front concessions A. and B., in South Dorchester, held in the meantime always been held under one title, first by McPhee, then by his assignee Steffins, then by the defendant Edwards. Steffins was living on that part of the 200 acres which formed the north part of lot 22, in broken front A., some years before the year 1825, and from thence continually, until Edwards his vendee succeeded him, who in like manner lived on that part of the 200 acres as he still does.

The north part of lot 22, in broken front concession A., was all the time uncleared and unoccupied, and not otherwise used than the uncleared part of other farms commonly are; but on the part of the 200 acres which composed lot 22, in the north part of concession A., there was a large clearing, and buildings, and stock as on other farms, and it was admitted that there was all the time ample distress on that part of the 200 acres returned by the Surveyor-General, on which the taxes might have been levied, if the assessments had been charged against the 200 acres as returned.

It was further proved by evidence of the Clerk of the Peace, and of a person who had acted as assessor and collector during parts of the period in question, that in 1820, Steffins had been assessed and paid

his taxes for 200 acres in South Dorchester, of the land which he occupied 188 acres being returned for that year as uncleared, and twelve as being cultivated; for 1822, 1824 and 1828, no roll could be found in the Clerk of the Peace's office, and the roll for 1827 was mutilated, the part which may have contained the entry of Steffin's assessment, being wanting; but the rolls for 1821, 1823, 1825 and 1826, contained entries shewing that Steffins, up to 1825, and Edwards after him, had been assessed and paid taxes for 200 acres in South Dorchester, the proportion of the cleared part to the uncleared increasing of course as improvements were made.

The rolls, it is singular, did not specify for what particular lot or tract any of the inhabitants were assessed; but it was not pretended that the 200 acres thus given in by Steffins and Edwards, and for which they paid taxes, were any other than the 200 acres in question, of which the north part of lot 22 in broken front concession B., formed a part.

Indeed, the collector who had received the taxes in 1825, was examined, and swore that he knew the tract well; that in 1825, and from thence till 1829, Edwards had paid him the taxes on the 200 acres, no part of which was assessed separately, but all as lot 22, in concession A., on which the house was.

It was contended, that under such circumstances, the sale of any part of lot 22, in concession B., for taxes, was illegal: 1st, because the taxes upon it were clearly not eight years in arrear, and in fact were not in arrear at all when the return was made up in 1828.

2ndly: because the owner was entitled, at any rate, to have the whole regarded as *one* tract; that the account should have been so kept by the treasurer, because the tract had been so returned by the Surveyor-General, and that there being all the time ample distress on one part of the tract, it was contrary to the express provisions or the statute, and the terms of the writ to the sheriff, that he should have sold any of the land.

The jury were directed that the land being returned in the Surveyor-General's schedule as a continued tract of 200 acres, with allowance for road between concession A. and B., and without any information how many acres were in A., and how many in B., the treasurer had no authority to open an account otherwise, and could not properly deviate from the return which was by law made the foundation of the whole proceedings, and could not take upon himself to say how much was in A., and how much in B., for he had no official information enabling him to divide the tract. It was not because the whole happened to be

granted in one patent, for when a patent grants lots 2, 3 and 4. for instance, in the fifth concession of a township, the taxes would no doubt be charged separately against each lot, because in the common course each lot would be returned separately in its proper concession in the Surveyor-General's schedule, but it was because in this case the Surveyor-General had on his schedule not distinguished between the blocks A. and B., but returned the 200 acres as one tract, embracing within it an allowance for road, and the law required the Treasurer's accounts to correspond with the schedule; that the fact of the Treasurer having done otherwise, and separated in his accounts what the Surveyor-General had made one, could not deprive the owner of the tract of the protection of the law, which forbade the sale of the land, so long as there was distress on the premises, that is on any one part of the tract against which the assessment should have been charged; and that besides this objection in the sale, the assessments would seem from such evidence as was given, to have been paid in each year in respect to the whole 200 acres.

The jury found a verdict for the defendants.

Becher obtained a rule for a new trial on the law and evidence, and for misdirection. *Wilson* shewed cause.

The arguments of counsel fully appear in the judgment of the court, No cases cited.

ROBINSON, C. J., delivered the judgment of the court.

The verdict was rightly rendered, in our opinion, for the defendants.

The first ground of objection to the sale was, that Steffins, and after him Edwards, had paid the taxes imposed by law on the very land which was sold. The evidence of this, it appeared to me, was such as could leave no doubt in the minds of the jury, that upon every part of the 200 acres returned by the Surveyor-General, as north part of 22, in broken front concession A. & B., the taxes had been paid by the occupant to the officer appointed to collect them.

In the case of *Doe dem.* v. *Reaumore*, (3 O. S. 243), we had occasion to consider for the first time the effect of such evidence in rendering the public sale and the sheriff's deed given under it invalid.

The facts in that case very much resembled those before us. The collector's roll had not specified the particular lot on which the taxes were paid, except I believe as to one year, but it was placed beyond doubt by the evidence, that the taxes on the lot in question had been paid by the proprietor, who resided all the time on the land, having abundance of property about him, on which the taxes, if they had not been paid, might have been levied by distress. The court determined

in that case expressly that the title under the sheriff's sale for taxes could not be up-held, if it were made to appear that there was in fact no arrear of taxes subjecting the land to sale, notwithstanding the return made by the treasurer, or that there was at the time of the sale sufficient distress on the premises.

In *Doe dem. Bell* v. *Orr*, the provisions and effect of the statute directing the sale of land for taxes, came again to be considered; also in *Doe dem. Powell* v. *Rorison*, and *Doe dem. Powell* v. *Craig*, and I think also in a case of *Doe dem. Cunningham*, of which I have no note.

In accordance with what has been already decided in these cases, we must hold, that if on either of those grounds the sale was made contrary to the provisions of the statute, the purchaser's title will be defeated. The clearer ground of the two seems to me to be that which relates to there being distress on the premises, and it is that ground on which we have most frequently had occasion to decide.

In my opinion, that exception was supported by the evidence in this case; for Steffins, and after him Edwards, had constantly lived on part of the 200 acres granted to McPhee, by the crown, and had not only paid the taxes in respect to the whole of it, but had all the time abunddance of personal property on the 200 acres; and I am clear, that considering how this property was held, and how it was returned by the Surveyor-General's schedule, no part of it could be legally sold for taxes while there were goods on any portion of it sufficient to make the amount charged as being in arrear. The Surveyor-General's report to the treasurer, made under the 12th clause of 59 Geo. III. ch. 7, returned all the numbered concessions of South Dorchester, as separate concessions, in the usual manner, giving in a distinct page the several lots in each concession; but the broken front concessions, A. and B., were returned as a kind of incorporated concession, forming as it were but one range, and at least not separated in the return and given as two concessions, with lots separately numbered in each, but the same page, under one general heading of "Broken Front Concessions A. and B," exhibited the lots 1 and 2, &c., as tracts running in every case through both concessions, and taking in all the land from the south side of B. to the river Thames, which runs along the front or north side of the tract thus returned as concessions A. and B. The concession A was thus returned as a sort of broken front to concession B., taking in whatever land there might be in all parts between B. and the river, and the return and the patent evidently shewed that the crown had described the two concessions in that manner as one continued tract, embracing within it an allowance for road at the northerly limit of concession B.

The treasurer, receiving the Surveyor-General's list in that form, had no more right to separate those concessions upon his own imagination of their respective contents, of which he had no official knowledge, than he had to open separate accounts against the broken front of any concession where the Surveyor-General had returned it as composing all one tract with the next concession in the rear. (a)

In that case, the proprietors of lots with broken fronts attached to them, would not be protected against having some part of their land sold for taxes, though they had constantly resided on the tract and paid taxes for the whole, merely because the treasurer had of his own accord opened a separate account against that portion of the tract which happened to be unoccupied.

The Surveyor-General in this case had not returned lot 22 in Concession B. as a distinct lot against which an account was to be opened, but lot 22—that is, one lot in *concessions A. and B.*

And the 14th clause of the statute directs in express terms, that the treasurer shall keep an account for every township, &c., "according to "the list or schedule furnished by the Surveyor-General, in which ac- "count he shall enumerate every lot or parcel of land in the township, "describing the same as in *the said schedule.*" If the treasurer had done so in this instance, his account would then have been kept, as it ought to have been, against "the north 200 acres of lot 22, in concessions A. & B.," in South Dorchester. And then, independently of the grantee being able to shew that he had all along paid the taxes on the land so designated, he would have enjoyed his land safe from danger of its being sold for taxes, because he could at all times have shewn that he was residing and had goods on part (and no matter what part) of the very tract against which the rates were charged.

The words "*north part of lot* 22 *in concessions A. & B.*, 200 acres," clearly make the two concessions one tract, of which the north 200 acres are returned as a separate parcel; the south 100 acres being returned as another parcel. Thus the crown had divided the two concessions into unequal portions, not designating how much was in one concession or how much in another; and, by taking upon himself to open an account against a lot in concession A., not separately returned to him, and assigning to it a certain number of acres, for which he had no authority, the treasurer inadvertently has given rise to this difficulty. The 6th clause of the 6 Geo. IV., ch. 7, expressly requires, that the treasurer

(a) So also in the case of municipal boundaries—such boundaries divide lots. See *Chief Superintendent in re School Trustees* v. *Storm*, 14 U. C. Q. B. 541.

in his return of lands in arrear shall specify the lot or parcel of land by the number or *otherwise, as the same appears* in the schedule furnished to the treasurer.

If in this case he had done so, then he would not have returned lot 22 *in concession A.* 100 *acres*, as being liable to be rated, but the north 200 acres of lot 22 in concessions A. & B., and then the sheriff going with that writ would have found ample distress on the tract so described and would have seen that he could not therefore sell any part of the land.

The Surveyor-General's schedule is made by the act the very foundation of the whole proceeding. The returns and writ not corresponding with it, have nothing to rest upon; and the defendant is not to lose his lands by their operation, when he has been in no default.

Per Cur.—Rule discharged. (*a*)

ANDERSON V. VANSITTART ET AL.

School Trustees—Teacher—Contract—Individual liability—Pleading.

The plaintiff charged the defendants upon a special agreement, stated to have been made by them *as trustees*, to furnish with fuel, *when required*, the plaintiff, a school teacher under the act 9 Vic. ch. 20. To this declaration the defendants demurred, on two grounds: 1st, because no request, with time and place, had been laid in the declaration to furnish fuel; 2ndly, because the defendants, having made the agreement stated in the declaration in their corporate capacity, were not liable as individuals, but had been so charged in the declaration. *Held, per Cur.*, declaration bad—upon both grounds of demurrer.

The plaintiff charged the defendants upon a special agreement,

(*a*) By the Assessment Act, chap. 55, Cons. Statutes U. C., p. 672, sec. 108, the Commissioner of Crown Lands is required to transmit to each county treasurer, yearly, lists of lands within such county granted or leased by the crown, or in respect of which a license of occupation has issued to any party; also, lists of all ungranted lands and of lands on which instalments of purchase money or rent remains due and unpaid; and thereupon the county treasurer is to furnish copies thereof to the clerk of each municipality in the county, and such clerk is to furnish each assessor with a statement showing what lands are liable to assessment. In regard to the lands of non-residents in arrear for taxes, whenever the county treasurer is satisfied that there is distress upon such lands, he is to issue his warrant to the sheriff to collect the same; but whenever the taxes are in arrear on such lands for five years or more, then the county treasurer is to issue his warrant to the sheriff to levy upon such lands for the arrears and costs, and every such warrant is to distinguish lands which have been granted in fee, from those which are under a lease or license of occupation, and of which the fee still remains in the crown. And in regard to such lands of which the fee is still in the crown, the sheriff is to sell only the interest of the lessee or locatee, and is to be so distinctly expressed in the conveyance, and the purchaser thereof is to stand in the place of such lessee or locatee, without requiring the assent of the Commissioner of Crown Lands.

stated to have been made by them *as trustees*, to furnish with fuel, *when required*, the plaintiff, a school teacher under the act 9 Vic. ch. 20. To this declaration the defendants demurred, on two grounds: 1st, because no request, with time and place, had been laid in the declaration to furnish fuel; 2ndly, because the defendants having made the agreement stated in the declaration, in their corporate capacity, were not liable as individuals, but had been so charged in the declaration.

D. B. Read, for the demurrer, cited 2 C. & J. 416; 3 Tyr. 468; 2 G. & D. 159; Smith's Mer. Law, 72; 2 Ch. Pl. 15; 6 M. & W. 815; 1 A. & E. 526.

G. Duggan contra.—(no cases cited.)

ROBINSON, C. J., delivered the judgment of the court.

If this action were otherwise well brought, the declaration must be held bad on demurrer, for want of the averment of a special request to furnish fuel.

The defendants, according to the agreement stated, only engaged to furnish it *when required*, and could therefore be charged with no breach in not delivering fuel without first shewing a request; and this being a material traversable fact, it should have been laid, with statement of time and place.

But, for the principal reason assigned, I am of opinion that the defendants are entitled to judgment.

The statute 9 Vic. ch. 20, sec. 25, makes the school trustees in each township a corporation, with capacity to sue and be sued, and makes it expressly part of their public duty to engage teachers, and provide fuel for the school.

We must therefore look upon them as acting, in those particulars, in their public corporate capacity, within the scope of their authority; and the plaintiff expressly charges them upon an agreement made by them *as school trustees*.

It is only in that character then that they are liable, and not in their private individual capacity. I am far from saying, that if the plaintiff had not charged the agreement to have been made by them *as trustees* (which was only stating the truth), he could have established any claim against them individually, but having expressly so charged it, the case is free from any doubt.

The cases of *Brown* v. *Morris*, 2 Taunt. 374; *Keating* v. *Temple*, 1 B. & P. 158; and *Prosser* v. *Allan*, Gows. N. P. C. 117, shew the impossibility of maintaining this action in its present form.

The defendants were merely carrying into effect, in a corporate capacity, the provisions of an act of parliament, not a private local act, but a general law of the land, which the school teachers and all others are bound to notice.

The plaintiff therefore must be taken to have known, and doubtless did know, that they were contracting with him on behalf of the public, and not individually; he could only look to the public fund for his remuneration, and not to the trustees individually, as being personally liable; and when he tells us in his declaration, that they only contracted with him *as trustees,* he deprives himself of all pretence for holding them liable in their natural capacity.

Per Cur.—Judgment for defendants on demurrer.

SHERIFF V. PATERSON ET AL.

School Trustees—Teacher—Contract—Personal liability.

School trustees acting under the statute 9 Vic., ch. 20, cannot be sued as individuals upon any contract made by them under the statute as trustees, as by such statute they are made a corporation, and enter into contracts as such.

(Q. B., H. T., 12 Vic.)

In this case the only question of importance was, whether the plaintiff, a schoolmaster employed by the defendants, acting as school trustees under the statute 9 Vic., ch. 20, could sue the defendants as individuals in their natural capacity, for his school dues.

Dempsey for the demurrer. *Wilson* contra.

The following authorities were cited, 6 A. & E. 820; 6 M. & W. 822; Harr. Dig. Corp. 664; 2 Saund. 5 (f.); 1 Ch. Pl. 428, 552; 2 Dowl. N. S. 418; 5 M. & W. 468; 4 A. & E. 262; 2 Ch. Rep. 291; 1 Saund. 28, note 3; 6 M. & W. 815; 8 M. & W. 614; 6 A. & E. 646; 5 A. & E. 526.

ROBINSON, C. J., delivered the judgment of the court.

This case is not distinguishable from that of *Anderson* v. *Vansittart,* *ante* p. 145, lately before us in this court.

We are bound judically to notice that these defendants, as school trustees, are incorporated and are liable to be sued in a corporate capacity only, and not as individuals upon any contract made by them under

the statute as trustees; and this in the face of the declaration is such a contract. (*a*)

How the plaintiff is to obtain satisfaction of any damages which he might recover against the trustees as a corporation, need not be now considered, since it cannot affect the question: (*b*) for whatever may be the certainty of his finding a fund on which he can have recourse, and whatever his means of seeking redress, it is plain he cannot sue the defendants in their natural capacity for acts done by them as trustees, and for which they are made liable by the statute to be sued in their corporate capacity.—1 B. & P. 158; 2 Taunt. 374; 6 T. R. 396.

Per Cur.—Judgment for the defendants on demurrer. (*c*)

DEMPSEY v. CITY OF TORONTO.

Municipal Officers—Appointment—Contract executed.

The plaintiff had been appointed many years ago by the corporation of the city of Toronto, weigh-master and clerk of the fish-market. He had been voted each year by the common council, a sum of money for his services during the then current year. The municipal year began on the 23rd of Feburary. For the year 1847, the plaintiff had been voted 90*l.* for his salary. On the 30th of June, 1848, the corporation having determined to farm out the plaintiff's office, he was dismissed without notice, and without any allowance being made for services between January and June of 1848. The plaintiff brought an action of assumpsit against the corporation, to recover a year's salary, at the same rate as he had been voted the previous year. The corporation resisted the action upon the general grounds:—1st that assumpsit for services rendered as

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(*a*) The Interpretation Act (Cons. Stats. Canada. ch. 5, sec. 6, No. 24) enacts that words making any association or number of persons a corporation or body politic and corporate, shall vest in such corporation power to sue and be sued, contract and be contracted with, by their corporate name, to have a corporate seal, and to alter and change the same at their pleasure, and to have perpetual succession and power to acquire and hold personal property or moveables, for the purposes for which the corporation is constituted, and to alienate the same at pleasure; and shall also vest in any majority of the members of the corporation the power to bind the others by their acts, and shall exempt the individual members of the corporation from personal liability for its debts or obligations or acts, provided they do not contravene the provisions of the Act incorporating them.

(*b*) See as to contracts between Trustees and Teachers, note (*a*) page 57 *ante* and the provisions in the Common School Act of 1860, as to the enforcing awards in arbitration cases.

(*c*) As the Trustees have power to levy rates upon their school section to pay off any debts contracted by or on behalf of the corporation, it is probable they may be compelled to exercise that power by a writ of mandamus. In the English courts the writ has been granted to compel making a rate, because expressly required by Act of Parliament.—*Rex* v. *St. Saviours*, 1 N. & P. 486. See note (*a*) page 72 *ante*.

upon an executed contract, not under the corporate seal, would not lie; 2ndly, that the plaintiff held his office at sufferance, both as respected tenure and allowance; 5rdly, that before action brought, the corporation should have been requested to vote an allowance. But *Held, per Cur.*, that assumpsit would well lie—and that though the plaintiff holding, by the act of incorporation, his office during pleasure, could not recover the whole year's salary, for 1848, still he was entitled to his salary for 1848 to the time of his dismissal, at the rate of salary voted to him for 1847—and that no previous demand upon the corporation to vote an allowance need be proved.

Assumpsit: 1st count, That in consideration that the plaintiff, on the 7th of February, 1848, would enter into the employment of the defendants, in the capacity of weigh-master and clerk of the fish-market, at a salary of 90*l.* a year, for one year, the defendants promised to employ and continue the plaintiff for one year from the 7th of February aforesaid; and that although the plaintiff, confiding in the defendants, promise, did enter into their employment, and continue until the 30th of June, 1848, yet that the defendants, during the same year—to wit, on the said 30th of June—wrongfully discharged the plaintiff, without any reasonable or probable cause whatsoever, by means whereof he hath been greatly injured, &c.

2nd count. For wages or salary, as clerk and hired servant of the defendants.

3rd count. On an account stated.

Plea, non-assumpsit and issue.

The plaintiff claimed 77*l.* 10*s.*, balance of the year's salary at 90*l.* a year, as weigh-master; and 104*l.*, for two years' salary, as clerk of the new market, at 52*l.* a year.

It appeared in evidence, that the municipal year of the defendants commences on the first Monday in February; that on Monday, the 23rd of February, 1835, by resolution of the common council of the city of Toronto, the plaintiff was appointed weigh-master and house-keeper; that on the 7th of December 1835, it was resolved that the weigh-master be allowed 75*l.* per annum, as his salary for the current year, also the further sum of 12*l.* 10*s.*, as house-keeper of the city-hall.

No appointment for 1836 appeared to have been made; but during that year the plaintiff resigned the situation of house-keeper, and on the 28th of September of that year, it was resolved that the weigh-master should be paid at the rate of 75*l.* per annum, for his services for the present year.

On Monday, the 20th of February, 1837, it was resolved that the plaintiff should be appointed weigh-master and clerk of the fish-market for the ensuing year.

No appointment appeared for 1838; but on Saturday, the 3rd of Feb-

ruary, it was resolved that the weigh-master be allowed 75*l.* for his services as weigh-master and clerk of the fish-market for the *past* year; and on the 24th of January, 1839, it was resolved that he be allowed 75*l.* for his services for the past year, as weigh-master and clerk of the fish-market.

It was usual for the plaintiff, and other officers of the defendants, to apply annually for re-appointment.

On the 11th of March, 1839, it was resolved that the plaintiff should be appointed weigh-master and clerk of the fish-market for the *current* year; and on the 20th of January 1840, it was resolved that the weigh-master be allowed 80*l.* for his services during the past year.

On the 16th of March, 1840, it was resolved that the plaintiff be appointed weigh-master and clerk of the fish-market for the current year. On the 12th of April 1841, a similar resolution was adopted for the current year. On the 17th of January, 1842, the weigh-master was allowed 80*l.* for his services for the current year. On the 18th of April, 1842, he was appointed weigh-master for the current year. On the 23rd of January, 1843, he was allowed 80*l.* for his services for the current year. On the 22nd of January, 1844, the clerk of the weigh-house was allowed 85*l.*, as *his salary* for the current year. On the 20th of January, 1845, a similar allowance was voted to the weigh-master as his salary for the current year. On the 30th of June, 1845, the plaintiff was appointed weigh-master for the current year. On the 26th of January, 1846, he was allowed 85*l.* as his salary for the current year. On the 2nd of March, the foregoing was rescinded, and resolved that the salary for the past year should be 90*l.*; and on the 1st of April, 1847, it was resolved that the weigh-master should be allowed 90*l.*, for his services for the current year.

Although annual appointments were not regularly made, the plaintiff performed the duties of weigh-master and clerk of the fish-market, without interruption, until the 30th of June, 1848, when his employment ceased, by reason of the weigh-house and markets being farmed out from that time.

On the 29th of February, 1847, the plaintiff, by written application, prayed to be continued in his present situation until the 8th of March following.

On the 3rd of March, 1847, the standing committee on appointments, reported to the city council, that the subordinate officers of the corporation could only be appointed during pleasure by provisions of the statute incorporating the city, and that it was therefore unnecessary to make annual appointments which were in effect invalid. The committee re-

commended such officers should be hereafter continued in their respective situations, without re-appointment, subject only to removal, as the law directs.

This report was adopted by the council; and although the plaintiff continued to serve, no re-appointment took place by formal resolution in the year 1847, or afterwards.

No alteration was made in the salary, and the chamberlain paid the plaintiff 90*l.* for the year 1847, which the council confirmed.

It appeared that the salaries were usually paid by occasional advances made by the chamberlain during the year on his own responsibility, not of course exceeding the amount that had been sanctioned for previous years; and at the end of the year the allowances for the past year were voted by resolutions of the council.

On the 12th February, 1848, the plaintiff signed a receipt for 19*l.*, being balance of his salary as weigh-master, &c., for 1847.

On the 13th March, 1848, the plaintiff, by petition, dated the 28th February previous, requested to be continued in his present situation of weighmaster which was referred to the committee on appointments, who made no report thereon; and on the 17th May, 1848, he gave a receipt for 12*l.* 10*s.* on account of his salary as weigh-master, &c.

The plaintiff gave evidence in support of his claim for an additional (independent) allowance, as clerk of the new market for the last two years, shewing that he had collected fees to the amount of 245*l.*, up to the 5th February, 1848; but the court rejected the demand as manifestly covered by the allowance of 90*l.* a year for all his services.

It was also stated by the clerk of the council and the chamberlain, that the usual course of the council was to grant allowances to the officers of the corporation by yearly vote, after the services had been rendered; and that it must be well understood by them that the amount of their remuneration depended entirely upon the liberality of the council to grant what was right. In short, that they were paid by occasional votes of the council.

The plaintiff was discharged or dispensed with without notice, and without cause, otherwise than that the defendants had farmed the situation, and considered he only held his offices during their pleasure, which was thus determined.

For the defendants it was objected:

1st. That the first count was general—for a yearly hiring, from February, 1848, to February 1849, and that it was not supported in evidence, even treating the defendants as private individuals.

2ndly. That the defendants could only (if at all) be bound by a

yearly hiring and salary, by contract under their seal, or by a formal act of the council, under the authority contained in the word "otherwise" in the statute of incorporation.

3rdly. That the act only authorized the plaintiff's appointment during pleasure, and that no action lay against defendants, the plaintiff being in fact at sufferance as respects both tenure and allowance. The statute 4 Will. IV. ch. 23, secs. 22, 55 and 53; also 4 Bing. 309, *Bristowe* v. *Collyer*, and 8 Jurist, 213, were referred to.

4thly. At all events, that the defendants should, before action, have been requested to vote an allowance or remuneration to compensate his services, in their discretion.

The learned judge at the trial held that, irrespective of the statute, there was ample evidence of a yearly hiring, although there was no proof of an express hiring or appointment for a year certain, or from year to year. But that as against the defendants, it could not be inferred, because the statute appeared to authorise them to dismiss him at pleasure; and it would be inferring against the terms of the act, even if the defendants could otherwise expressly or impliedly bind themselves by parol for a year certain; wherefore the plaintiff could only be regarded as a yearly officer, *sub modo*, that is, in the event of the defendants not seeing fit, in the exercise of their pleasure, to dismiss him during the currency of the year.

That he did not think him entitled to recover a year's salary as for a wrongful dismissal, but that his claim for remuneration during the period of actual service, *i. e.* from the first Monday in February to the 30th June, 1848, should be left to the jury.

It was then mutually agreed that the jury should find a verdict for the plaintiff for 23*l.* 10*s.* being the amount the plaintiff would be entitled to at the rate of 90*l.* a year, deducting the 12*l.* 10*s.* paid to him by the chamberlain on by the 17th May last, with leave to the defendants to move to enter a verdict for them, if on the record and the evidence the plaintiff was not entitled to recover at all, and with leave to the plaintiff to move to increase the verdict to a sum sufficient to make up the salary for a year at 90*l.*, if the court should be of opinion that he was entitled thereto.

Cross rules were accordingly obtained and argued. *Burns* and *Dempsey* for the plaintiff, and *H. J. Boulton*, *Q. C.*, for the defendant.

The statute and authorities cited were—Harr. Dig. Cor. 1 Ch. Pl. 119 note; Angel & Ames Corp. 382, 383, 209; 5 A. & E., N. S., 546; 4 Mg. & Gr. 860; Comyn's Dig. Franchise F. 32; 8 Jur. 213;

4 Bing. 209; 8 A. & E., N. S.; 4 Will. IV. ch. 23, secs. 22, 53, 55, 57, 75; 12 Jur. 923; 6 A. & E. 829; 14 M. & W. 831.

ROBINSON, C. J., delivered the judgment of the court.

I think the light in which this case struck the learned judge at the trial was correct, and we all are of opinion, upon the consideration which we have given to the case, that the plaintiff is entitled to recover *pro ratâ* for the proportion of the year, 1848, which he served as weigh-master and clerk of the fish market, according to the remuneration last fixed by the corporation; and that there is no clear ground on which we could hold him entitled to more; though his case seems a hard one, and he would seem to have been too summarily dealt with, considering that no fault was found with him, and no blame imputed to him.

The first point to be disposed of is, are the defendants liable to be sued in assumpsit; for if they are not, then there could be no recovery in this case, even upon the second count. The case of *Beverly* v. *the Lincoln Gas Light and Coke Company*, 6 A. & E. 829, is an express authority that a corporation may be sued in assumpsit upon an executed consideration as for goods which have been sold and delivered to them, and a demand for services actually rendered to them, at their request, must stand upon the same footing. The elaborate judgment of the court delivered in that case by Mr. Justice Patteson, shews that while the court disclaimed any intention to innovate upon the principles of the common law, they found it not easy to support by express authority the judgment they were pronouncing. The reasoning, however is satisfactory, I think, to shew that what they were then deciding fairly resulted by reasonable inference from what had been been already decided; and we have in this country gladly availed ourselves of whatever can be found in English decisions, having a tendency to remove a technical difficulty that would in general be found to militate against the claims of justice.

We have no occasion to consider whether the distinction which used to be recognized as existing between executed and executory contracts, so far as it bears on the necessity of using the corporate seal, is a solid distinction (which in the case of *Church* v. *the Imperial Gas Light Company*, 6 A. & E. 846, the Court of King's Bench seemed wholly to deny); because in the case before us the contract was clearly executed, in respect, I mean, to the plaintiff's claim for wages during the time that he actually served; and as regards that part of the demand, we can have no difficulty in holding that the defendants cannot stand upon it as a general principle, applying to all cases of corporations, that they are not liable to be sued in assumpsit for goods sold and

delivered, or for services rendered to them, because they have never promised, under their seal, that they would give a recompense. (*a*)

But then it is objected that, even as regards this part of the plaintiff's demand, he has no right to recover, admitting that a corporation may be sued in assumpsit upon such a demand, for that he can have no legal claim to any remuneration except what the common council may choose to vote him; that he can only claim under their vote or resolution in his favour, and that at all events the corporation can be liable to no action for his salary or wages, until he has first demanded of them to make him an allowance, and been refused after a reasonable request.

These objections are grounded on some provisions of the Toronto Corporation Act, 4 Will. IV. ch. 23. If there is anything in the statute that can support them, it must be found in the 51st, 57th, 60th, and 75th clauses, especially in the 57th and 75th, which enact, that the common council shall allow to the inferior officers appointed by them "*such remuneration as to them shall seem meet,*" for those are the words of the 57th clause, the 75th clause being the same in effect, viz., that it shall be lawful for the common council to allow such salaries or perquisites of office, to the different officers appointed by them (except the mayor and chamberlain), *as they shall deem just and reasonable.* This, it is contended, places all such officers at the discretion of the common council, who, after they have received their services give them much, or little, or nothing, at their pleasure; but such is not the intent, or the effect, in my opinion, of these provisions. They are meant to give authority to the council to appropriate, and charge the public fund for such purposes, by their vote according to their discretion; in other words, to apply them as an individual can apply his own funds, in remunerating those whom he may have occasion to employ. (*b*)

The council are by these clauses authorised to make all such necessary disbursements. It is true, that they may assign to any officer whom they propose to employ such remuneration as they may think reasonable, and no one can compel them to give more. The same discretion rests

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(*a*) The question as to how far a corporation may be bound by an executed contract has been very fully discussed in this Province, in the cases in Appeal of *Pim* v. *Municipal Council of Ontario* (9 U. C. C. P. 304), and *Marshall* v. *School Trustees of Kitley*. The question has, however, been again raised in the Court of Chancery in the case of *Whitehead* v. *Buffalo and Lake Huron Railway*, 7 Grant. 351, and although it was held by the majority of the Judges that the Court was bound to follow the case of *Pim* v. *Municipal Council of Ontario*, the case has been appealed, and will shortly be heard before the Court of Appeal.

(*b*) See also as to the remuneration of Municipal Officers, note (*a*) page 132 *ante*.

with every private individual in the management of his own affairs; and it is for the person who is asked to give his services to determine whether he will serve or not on the terms proposed to him. But it is not reasonable to suppose that the legislature could have intended, with respect to inferior officers of the description in question, whose services are not in any degree honorary, like those of the chief officer and the directors of a corporate body, that they are to give their time and labour throughout the year, and that after the corporation had availed themselves of their actual manual labor, they have a discretion to give them at the end of it 100*l.*, or five shillings, or nothing.

There have been cases no doubt, where persons have been found willing to serve on the express condition, that they are to take their chance of getting anything or nothing. That may be when the service is partly honorary, and the place desired for other reasons than money merely, or where it is well known that it must be uncertain whether the employer will have the means or not of giving any compensation. But this municipal body have power by law to raise by assessment the means of paying indispensable charges, and it could never had been intended that they might employ a clerk of the market, and a weigh-master, whose daily labor and attendance would be entitling the corporation to fees which they receive through his hands, and then that because they had appointed him no salary at the beginning of the year, they could resolve at the end that they would give him nothing. That the parties might possibly be on that footing with each other there can be no doubt, but it would be a strange and very unusual footing for a subordinate officer of this kind to be serving upon; and the question for us is, whether the statute, and what had taken place, between these parties before the plaintiff's dismissal, can be be fairly held to have placed him in that position. We do not think so.

The plaintiff appears to have been serving the corporation in the same capacity for about thirteen years, receiving never less than 75*l.* a year, which the council gradually raised to 90*l.*; the plaintiff's labour, as it may be supposed, increasing with the population of the city, and with the consequent increase in the business of the market.

The common council usually voted him at some period within the year a remuneration by way of salary for the current year, which did not vary from the last, except by an occasional small increase. For 1847, he received in this way for his services 90*l.*, he went on serving in the year 1848, when on the 30th June the common council, not having made in that year any appropriation for his wages, suddenly dismissed him for no fault imputed to him, but because they then resolved

to farm out the situation in which he was serving. Having express power by law to remunerate him out of the public funds for the services he had rendered, they were bound I think to do so, and should have done so before they voluntarily dismissed him. Having put an end to his service and to the relation between them, has not the plaintiff a claim to enforce that just and reasonable compensation for his attendance and labour, which the defendants had authority to give him out of funds under their control, but which they had not given him? This cannot, I think, be denied. Because the 75th clause of the act makes it *lawful* for the common council to allow him whatever they may deem just and reasonable, he has not the less claim to demand of them to pay him what is in fact just. It is *lawful* for an individual who has employed another to give him as much for his service as he may think just or as he may choose; but he has not therefore a legal right to say that he will give nothing, or what he chooses; neither do I think the corporation have a discretion, after they have received service, to allow it to pass without recompence, or with a mere nominal recompence.

Since the defendants passed no resolution during the year 1848, and while the service continued, for remunerating the defendant, but dismissed him without, the jury were warranted, I think, in taking the usual allowance that had been given, as the measure of recompence, supposing it to be the tacit understanding that the defendants were receiving the service on those terms.

The office of weigh-master is not mentioned in the statute, nor clerk of the fish market, otherwise than as it is included under the general term "clerks of the market," and I do not see that the plaintiff stands in any other situation than any person would have done whom the defendants might have employed to keep the market square clean and in order for a year, and might have dismissed after some months' labour, without giving him any remuneration for his labour. All that could be said in such a case would be, that as between themselves, the governing body and the city for whom they were acting, the defendants could give him what they pleased; that they might have resolved what they would give him before they set him to work, and then he might have accepted their allowance, or not, as he pleased. If he declined it, he would lose the employment; if he accepted it, whether much or little, he could claim no more; but if he merely set him to work, and said nothing about paying him. they would have no discretion after they had received his services, to resolve to pay him nothing, or whatever they chose. He could then have claimed a just remuneration for his labour, and would not be wholly at the mercy of his employer.

Though nothing is said about it in the act, the common council have, no doubt, authority to purchase various articles necessary for conducting their business; such as furniture for their hall and offices, stationery, &c. It *is lawful*, no doubt, for them to pay such sums as they think just and reasonable for the goods so purchased; but if they make no bargain before hand, the seller will compel them, as well as others, to pay what the goods are worth, and the defendants could not be allowed to be the judges in their own case, and enforce the acceptance of whatever they might choose to pay.

As to the necessity for the plaintiff making a formal demand on the defendants to vote him an allowance after they had dismissed him, I do not consider that we can hold that to have been indispensable.

The defendants knew he had served; knew they had dismissed him for no alleged misconduct, but to enable themselves to make another arrangement; and they must be taken also, I think, to have known that he had a legal right to be justly remunerated for his services rendered. This action is a sufficient assertion of his claim, unless we should be justified in holding that the plaintiff can recover nothing but what the corporation has previously resolved to pay him. They might, for all that can be shown, choose to vote him a few shillings, or nothing; and unless that vote would be conclusive upon him, he cannot be bound to suspend his action, till they have made it, or been asked to make it.

We are of opinion, therefore, that for the sum which the jury has given as a just reward for the service up to the 30th June, 1848, the verdict may be properly entered. For any sum beyond we do not think the plaintiff's claim is sustainable. The act, in our opinion, gave to the defendants a right to put an end to the plaintiff's service at any time they might think proper, and for any reason they might think proper; and neither upon the act itself nor upon what had taken place under it, can the plaintiff claim a right that his service should continue till the end of the year. If he could not insist that he was engaged absolutely for a year, he could not claim a right to be paid to the end of it, nor for any longer time than he actually served.

The 22nd and 55th clauses are express that the common council may remove their inferior officers at their pleasure. The plaintiff must be supposed to have known that he was serving on those terms, and to have acquiesced in the condition. What passed in 1847, and the plaintiff's own petition presented in 1848, praying to be continued in the office, shew that the uncertain tenure of the office was clearly understood by the plaintiff. He desired to have an appointment for the year;

the law did not sanction that; the common council did not accede to it; and we cannot on any ground hold that he was entitled to be regarded as being on that footing.

The case of *Beeston* v. *Collyer*, 4 Bing. 309, was cited in argument, and there is a good deal in the language of the judges that applies strongly in this plaintiff's favour, so far as regards the abrupt dismissal of him before the year ended; but that was a case between individuals, and to be determined on general principles applicable to such contracts. Here the service was rendered under an act of parliament, containing provisions which bear upon the point of duration of the service, and which must have their effect, and there is reason and good policy to support them. This part of the case we think clear.

The other question, whether the defendants are liable to be sued upon a *quantum valuit*, as an individual certainly would be, is a point which we have felt to be much more doubtful; but our opinion is, that they are liable, and that the verdict may be entered for the plaintiff, for 23*l.* 10*s.*

Per Cur.—Verdict to be entered for the plaintiff for 23*l.* 10*s.* (*a*)

COMMISSIONERS OF PUBLIC WORKS v. DALY ET AL.

Commissioners of Public Works—Cornwall Canal—Arbitration—Setting aside award.

In dealing with awards made under the provincial acts 9 Vic. c. 37, sec. 24, and 10 & 11 Vic. ch. 24, sec. 3, the court will be governed by the ordinary rules of law as applicable to awards made between party and party.

Under the two acts above mentioned, a submission by the governor in council to arbitration, is a submission in effect by the commissioners of public works.

The award made by the arbitrators appointed under the above acts, stated that they awarded that the commissioners of public works should pay to A. the sum of, &c., for the damages done to his property in the village Milles Roches, by the construction of the Cornwall Canal." No further particulars of damage were stated in the award. Affidavits, however, were filled by the engineers of the public works, to shew that in their belief the sum awarded must have been given, from its amount, for consequential and not direct damage, such as the commissioners contended the arbitrators could alone award upon. But, *Held*,

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(*a*) It is now provided by the Municipal Act, s. 173, Consolidated Stat. U. C. p. 561, with regard to Municipal Corporations, that in case the remuneration of any of the officers of the Municipality has not been settled by Act of the Legislature, the Council shall provide for the payment of all municipal officers, whether the remuneration is settled by statute or by by-law of the Corporation.

The view taken in this case of the liability of a Municipal corporation to be sued in assumpsit upon an executed contract, has since been upheld by the Court of Error and Appeal in the cases of *Marshall* v. *the School Trustees of Killey*, not yet reported, and *Pim* v. *Ontario*, before referred to.

per Cur., that the affidavits nowhere stating in positive terms that the commissioners had allowed for consequential damages, and the award being silent upon the subject as it might be—the court could not assume the fact to be so—and upon that ground (if a valid one) set aside the award.

Quære? have the arbitrators the power under the acts above named, to award for consequential damage, as for loss of the carrying trade through the village of Milles Roches. No decision of the court was rendered necessary upon this point, but see the opinions of the court thereupon.

The time given by the statute within which to move to set aside these awards, viz., one year, extends to Upper as well as Lower Canada.

A rule *nisi* had been obtained, on behalf of the commissioners, by *Blake*, Solicitor-General, calling on Daly to shew cause why the award made in this case should not be set aside—

1st. Because the award shewed no submission between the parties, but was an award made upon a reference by the Governor in council.

2ndly. Because the award did not shew that the said Daly had sustained damages by the construction of the Cornwall canal; or what the damage was which had been awarded upon.

3rdly. Because the award was founded upon, and allowance was made upon, matters of alleged damage, not within the statute.

4thly. Because the damages were excessive and unjust.

5thly. Because the award did not shew that the claim for damages arose from the construction, or was connected with the execution, of any public work theretofore undertaken, commenced or performed, at the expense of this province, or of Upper or Lower Canada.

A rule, in the same terms, had been obtained in other cases of awards made upon claim for damages occasioned by the construction of the Cornwall canal, which will be presently enumerated.

The rule obtained in the case of the commissioners and Alexander McNairn, only varied from the others in assigning as another objection to the award, that "it is against evidence, as the claim had been before adjudicated upon and settled."

The award in the case of John Daly was by William Freeland, Henry Fry, and John Ogilvy Hutt, Esquires, made on the 16th March, 1848. It recited that they had been duly appointed arbitrators and appraisers, for Upper Canada, by the Governor in council, under and by virtue of an act, passed in the reign of her Majesty Queen Victoria, entitled, "An act to amend the law constituting the Board of Works;" setting out the authority given to them by the statute, which is—"to arbitrate, appraise, determine and award the sums of money, which should be paid, to any owner or owners, occupier or occupiers, or persons representing such owner or owners, for the *land or real estate which it might be necessary to take*, either in perpetuity or temporarily, for the use and

purposes of the public works, or any of them therein set forth, or *as compensation for loss or damage which might accrue* to them from the struction of such public works, or any of them, and with whom the commissioners of the said public works had not or could not agree, or whose claims had not been settled or adjusted under the former laws; and also on any unsettled claim or claims, for property taken, or *alleged direct or consequential damage to property, arising from the construction or connected with the execution of any public works in any part of the said province;* or any unsettled claim or claims arising or to arise out of or connected with the execution or fulfilment, or on account of deductions made for the non-execution or non-fulfilment of any contract or contracts made for the performance of any such public works as aforesaid, or any part thereof, made and entered into with the commissioners of the said public works, or with any other board, or any commissioners lawfully authorised to enter into the same on behalf of the province."

The award then recited, that John Daly, of the village of Milles Roches, had preferred a claim "for damages done to his property by the construction of the Cornwall Canal," and with whom the commissioners of the said public works had not agreed and could not agree.

And the arbitrators proceeded to state, "that his Excellency the Governor in council, had referred to them the claim of the said John Daly, for their decision; and that having taken upon themselves the charge of the said award and arbitrament, and having been attended by the parties, &c.; *and having inspected the premises for or on account of which such compensation for damages was claimed,* they made their award as follows, viz. :—

"That the commissioners of public works do pay to the said John Daly the sum of 75*l. for the damages done to his property*, in the village of Milles Roches, by the construction of the Cornwall canal."

The award was made under the hands and seals of the three arbitrators.

A *precisely similar* award was made in favour of Eliza Burphe, except that the sum awarded to her was.....£250 0 0

And so in favour of	Jeremiah Vandusu, for.....	113	0	0
" "	Nelson Stevens, for.....	200	0	0
" "	Charles Letrace, for.....	150	0	0
" "	L. Durosie, for.....	100	0	0
" "	James Irvin, for.....	113	0	0
" "	Jesse B. Hawley, for.....	200	0	0
" "	Hector Manson, for.....	250	0	0

And so in favour of	James Bowen, for	£75	0	0
"	"	Merilla Hover, for	90	0	0
"	"	Marcus B. Herriman for	200	0	0
"	"	William Emery, for	150	0	0
"	"	Sewel Cutler, for	250	0	0
"	"	William D. Brooks, for	110	0	0
"	"	William Daly, for	130	0	0
"	"	Eliza Waggoner and Henrietta Colwell, for	130	0	0
"	"	Sarah Kewin, for	150	0	0
"	"	George Robinson, for	300	0	0
"	"	Israel Brooks, for	250	0	0

The award in McNairn's case, stated the money claimed to be for "damages to his dwelling-house and premises, in the township of Cornwall, by the construction of the Cornwall canal through the same," and awarded, "for damages which he had sustained by the construction of of the Cornwall canal through his property, in the township of Cornwall, 250*l*."

The other awards were all in precisely the same terms as that in favour of Daly, *i. e.* "for damages done to the property of the claimant in the village of Milles Roches, *by the construction of the Cornwall canal.*"

The village of Milles Roches, is a small village on the bank of the St. Lawrence, some miles above Cornwall. Before the canal was made, the main public highway through the province passed near the river, the village of Milles Roches being on each side of it, so that it was conveniently accessible to all the inhabitants of the village. The canal had been made to run on the north side of the village, crossing the old line of the road near the western end, and keeping on the north side or behind the village, leaving the village and the old line of road between it and the river, and thus cutting off the village from the new line of road which had been made outside or north of the canal, and thereby depriving the inhabitants of convenient access to the country around them. To get from the village to the present main road, it is necessary to pass through a culvert, which crosses the canal behind the village. All the claimants in the cases before the court live on the south side of the canal; some of them immediately on the bank of the river St. Lawrence.

With respect to the case, as it concerned all the claimants except Alexander McNairn, George Robinson and Israel Brooks, it was sworn on behalf of the commissioners, at whose instance this application was made, that before construction of the Rideau Canal a very large traffic was carried on at Milles Roches, by reason of goods being obliged to be

landed at Milles Roches (on account of the rapidity of the current of the St. Lawrence at that point, and for some miles above), and to be carried by land, on carts or waggons, for several miles, which gave employment to many persons living at Milles Roches; and by means of this, and of the water power along the river, a very considerable village was rising: that after the Rideau Canal was made, however, very little of this business of transportation upwards, pass Milles Roches, was carried on; and what little there was ceased upon the completion of the Cornwall Canal: that by the construction of the new road, the travelling which before that passed along the old road had been chiefly diverted to the new: that the claimants had not (as it was believed) sustained any damage by the construction of the Cornwall Canal, unless the old road being stopped up, and the travel being diverted from the old road to the new, and the claimants having to go by the culvert to the present main road, could be considered as damage.

It was shewn further, that in the opinion of the civil engineers of the government, who made these affidavits, the amounts awarded to the respective claimants were excessive and unjust.

The same facts and opinions were sworn to as regarded the cases of the claimants, Robinson and Brooks, except that it was admitted that in these cases land had been taken for the purposes of the canal: that they preferred their claim before the said arbitrators, not only for damages alleged to have been done to their property, but for land taken by the commissioners; and the arbitrators had received such claim, and had only awarded as for damages done to property, while they had, as the deponents believed, included in the estimate of such damages, the value of the land taken.

In the case of Alexander McNairn, it was sworn by the civil engineer employed by the government, that five acres of McNairn's land was taken and used for the purposes of the canal, for which land compensation was made to him in or about 1839, by the commissioners, at the rate of 15*l.* per acre; and that for such land, including houses, fences, and all things whatever, there was allowed to him 137*l.* 16*s.* 3*d.*, which, as deponent believed, was allowed to him for all damages he could claim or was entitled to in any respect, for land taken or damage done to him or his property by the construction of the Cornwall Canal, and was in the opinion of the defendant an ample allowance. But the canal bank being near to McNairn's house, and apprehension being expressed of the insecurity of the house in consequence, the commissioners, in 1843, built a stone wall up the side of the canal, and filled up the intervening space to his house, at an expense of 75*l.*: that the

house was worth no more than 175*l.*: that the deponent could not understand for what the arbitrators could have awarded 250*l.*, as he had been already fully recompensed for property taken and damage of every kind.

It was sworn further, by another of the engineers employed on the canal, that he was present in September, 1843, when Mr. McNairn preferred to Messrs. Vankoughnet and Shaver, then acting as commissioners of the St. Lawrence Canal, a claim for damages; upon which the following remarks were made by their secretary. "The claim of Alexander McNairn, for land and buildings on lot 25 east half, amounting to 500*l.*, being examined, it was ordered, that he be paid the sum of 3*l.* 5*s.* 7*d.* for additional land taken by the canal and not paid for, and in full of his claim:" that, nevertheless, one of the late commissioners who made that order, being produced on behalf of McNairn in the last arbitration, swore that he ought to be paid for his dwelling house, which they valued at 250*l*, and it had not been taken into consideration when the 3*l.* 5*s.* 7*d.* was allowed to him: that the utmost value of the house was 175*l.*; and that it could be removed to a convenient place on McNairn's land, and replaced in good order, for 150*l.*: that 250*l.*, if awarded for the house, was excessively unjust; but the deponents say they cannot tell for what it had been awarded.

On the other hand, affidavits were filed of McNairn, and on his behalf of Messrs. Vankoughnet and Shaver, and D. B. McDonell: that the 3*l.* 5*s.* 7*d.* was only awarded as a compensation for a few perches of land taken in addition to the four acres: that the commissioners considered that they had no authority to entertain his claim for the house, and that the board of works must settle that. The two former swore that they did, at the request of the board of works, in 1843, soon after allowing the 3*l.* 5*s.* 7*d.*, apply to McNairn to know what he would be willing to take as compensation for the house, and that he demanded 300*l.*, which had never been paid to him.

Brough, *Vankoughnet*, and *J. Lukin Robinson*, shewed cause. *A. Wilson* in reply. The arguments of the counsel upon the construction of the provincial statutes 9 Vic., ch. 37, sec. 24; 10 & 11 Vic., ch. 24, sec. 3, and other clauses of these acts, and upon the general principles applicable to setting aside awards, fully appear in the several judgments of the court.

The following authorities were cited during the argument: 2 Mod. 169; 2 Cr. & M. 235; 2 T. R. 781; 1 E. R. 276; 8 E. R. 466; 2 Burr. 701; 3 Dowl. 317; 2 Dowl. 651; 2 Y. & J. 259; Watson on Awards, 219; 1 McL. & Y. 393; 1 Cr. & M. 533; 8 E. R. 15; 6 B. & C. 822; 6 A. & E. 123; 5 B. & Ad. 519.

ROBINSON, C. J.—The authority of this court to interfere in regard to this award, is given by the provincial statute 9 Vic., ch. 37, sec. 21, and 10 & 11 Vic., ch. 24, sec. 3.

The former statute provides for three persons being appointed arbitrators in Upper and Lower Canada respectively, for the purpose of determining what amount shall be paid to claimants for property taken for public works, or damages done to property by their construction. The government is to appoint them. And it is enacted, "That the decision of the arbitrators shall be subject to the jurisdiction of the superior courts of law or equity within the jurisdiction whereof such arbitration shall have taken place, in like manner and to the same extent, and under the same regulations as apply to arbitrations by the submission of the respective parties." (*a*)

This is the footing on which any control over such awards can be exercised in Upper Canada.

In regard to Lower Canada, a special provision is made in the same clause, which is to be accounted for from the different nature of the jurisdiction exercised by the courts there, they being judges of fact as well as of law in most cases. This provision, it is clear, is confined by the act to Lower Canada, and need not therefore be considered by us. But a sentence is added, which applies to both divisions of this province, and which provides "That no such award shall be set aside in any case, unless the application to the court shall be made within one year from the date of the award." (*b*)

It is plain, from this short statement, that we are to be governed in general by our ordinary practice, in dealing with the awards made by the arbitrators in question.

The other statute 10 & 11 Vic., ch. 24, sec. 3, contains some provisions respecting awards for damages done by the construction of public works, but it provides "That any award made under the former act, or under that act, shall be subject to all the provisions contained in the

(*a*) The present Act (Con. Stats. of Canada, ch. 28, p. 321) provides (sec. 63) that in Upper Canada all awards or decisions of the arbitrators shall be subject to the jurisdiction of the superior courts of law or equity within the jurisdiction whereof the arbitration has taken place, in like manner and to the same extent and under the same regulations as apply to arbitrations under the submission of the respective parties—except that no such award shall be set aside unless the application to the court is made within one year from the date of the award.

(*b*) It is now provided by the 61st section of the Act referred to in note (*a*) that application to set aside an award in Lower Canada must be made within four months from the date of the award; the proceeding is by petition addressed to the Superior Court.

former act, (9 Vic., ch. 37) for the annulling or confirming awards directed to be made," &c.

According to the law of this court, then, in such cases we must confine ourselves to the objections stated in the rule nisi. At least, that is the general course, whatever discretion the court may have in extreme cases to act upon objections substantial and clearly fatal, though not brought to their notice by the parties.

It is the commissioners of public works in these cases, who on behalf of the government move against these awards. It may seem on the first impression, not very reasonable that they should do so, considering that the commissioners are all gentlemen appointed by the governor in council, and in whose selection the claimants, contrary to the usual course of arbitration, have no voice; but on the other hand, we must presume that the government has selected impartial persons, having no greater bias in favor of the crown than of the claimant, and as they may err in judgment with the best intention, or may act illegally with or without bad motives, it will of course be the proper duty of the commissioners of public works in any such case to apply against the award; and the statute expressly provides for it.

The first exception taken is, that the award shews no submission between the parties, but appears on the face of it to have been made upon a reference by the governor in council. In that respect the matter seems to have taken the course contemplated by the statute 9 Vic., ch. 37, the 25th clause of which empowers the governor in council to refer to the arbitrators any unsettled claim of the nature of that in question for their decision.

It does not appear on the papers before us, when the claim was made, or the reference; but only that the award was made in March, 1848. I believe all may have taken place after the passing of the later of the two acts; that is, since July, 1847, in which case the reference to arbitration would as properly be made by the governor and council, as if it had been done before the act was passed. The commissioners under the later act might have tendered what they though a fair compensation within a certain time from the claim being made, and perhaps they did; though they were not bound to do so, in order to make any future reference regular, because that is a mere provision made for the protection of the government against unnecessary costs, if they choose to avail themselves of it. If the tender, being made, was rejected, or if no tender was made, the submission to arbitration would properly be by the governor and council.

I do not mean to say that the commissioner of public works might

not perhaps take upon themselves to make the reference, under the general language of the 3rd and 4th clauses of the last act, though it is not expressly said that they shall or may do so; but if they did, the reference would be treated as binding (if held to be so), on the ground that it was made by the department representing the government in matters of that kind, and I see no reason to doubt that the authority given by the former act to the governor and council to make the reference to arbitration in such cases, continued after the second act the same as before.

The 3rd clause of the second act directs that the commissioners when they tender any amount of damages shall give notice that if it be not accepted, "the claim shall be submitted to the decision of arbitrators appointed under the first act," and submitted, for all that is said to the contrary, as the first act directs, that is by the governor and council; and at any rate, we cannot recognize the commissioners of public works as having any interest in this matter distinct from the government; we must look upon it that it is the government through them, or through their own counsel, we cannot tell which, that are now moving against this award. It would be strange to suppose that the government can be insisting upon it as a ground for setting aside the award, that it was made upon their own submission.

I suppose the course taken was the natural one; that the claimants made their claim to the commissioners, who reported the claim to the government, and the refusal of the compensation tendered. if any were tendered; and that the governor and council then referred the claims to the arbitrators as comtemplated by the first act, and equally I think by the second.

The second exception is, that the award does not shew how the claimant sustained damage by the construction of the Cornwall Canal, or what that damage was.

In that respect all the awards except that in McNairn's claim are alike: the claim is recited in them as having been made "for damage done to his property in the village of Milles Roches, by the construction of the Cornwall Canal." The arbitrators state in their award, that "they had inspected the premises for or on account of which such compensation for damages is claimed," and they award that the commissioners of public works shall pay to each respectively, the sum of, &c., "for the damage done to his property in the village of Milles Roches, by the construction of the Cornwall Canal."

The award, it will be seen, receives no additional explanation from the claims, for they are both in the very same words, and as all the

awards, except in McNairn's case, follow the same form, they are either all good, or all bad, so far as this exception is concerned.

The 3rd clause of 10 & 11 Vic., ch. 24, requires that each notice of claim shall state the particulars thereof, and how the same has arisen. What the notices of claim in these cases did in fact contain is not shown us, they may therefore, for all we now know, have shown particularly enough the nature of the injury or damage complained of. If they did, then the award would settle all the damage which had been so in fact referred, and at any rate it would settle all claims for damage, as I consider, of which the claimant was aware, and which therefore he might have included in his claim; though that is a point which might seem to deserve more consideration.

But we have no power to import in disposing of these awards, any new principle into the law of awards. It might be very convenient, and would be judicious with a view to the possibility of further claims, to describe in the award minutely the damage for which the compensation was awarded, but we cannot arbitrarily exact such a condition. The legislature has not required it, and the common practice in case of awards does not.

On the contrary, A. makes claims upon B., and they are referred; they may consist of a variety of complicated demands, but the arbitrator commonly ends his investigation by directing that B. shall pay a stated sum on such a day, and there is an end of it.

It would be rather for the protection of the party claiming than of the other, that particulars need be stated; for unless they are, the award would in its effect be looked upon as a compensation for every thing that could come within the submission. And when we consider besides, that the award is here made by arbitrators appointed by the government, we should incline the less readily to set the award aside at the instance of the government, for any supposed defect of form. The claimants to whom this money is awarded might reasonably complain, if at the instance of the government, we should set aside awards made by the arbitrators selected by the government, for such defects in form as would not be held to invalidate awards made between party and party.

The law does not require that awards shall specify the particular grounds on which the sum awarded is to be paid, and we have no authority to make these awards exceptions to the general rule.—1 P. & D. 391.

The third ground on which the rule has been moved is, that the money is awarded to be paid upon matters of alleged damage not within

the statute. If this is to be taken with reference to what the award there is certainly no ground for exception, for "damages done to his property in the village of Milles Roches by the construction of the Cornwall Canal," comes directly within the scope of the grounds of claim specified in the 25th clause of the 1st statute, and the 3rd clause of the second.

The very same words are used in both places, namely, "*claims for alleged direct, or consequential damages to property arising from the construction, or connected with the execution of any public work.*"

The award gives the money as compensation for "damages done to his property;" the statutes allow the claim for any damages done to property, whether direct or consequential, and any damage to the property that could be shewn to arise from the cause referred to, must come under one of these heads or the other. Then the award states the damages to have been done (*i. e.* occasioned) by the construction of the Cornwall Canal, which unquestionably comes within the description of "damage to property arising from the construction, &c."

The award then shews no ground for holding that the arbitrators went beyond their authority in any allowance they made, and there is nothing placed before us in the affidavits or otherwise upon which we can pronounce that the fact was so. It is stated, indeed, in the affidavits, that the inhabitants of the village used to derive profit from transporting goods past the rapids by land, but that the construction of the Rideau Canal had for the most part put an end to this business, and that what little they may have continued to do in that way was no longer required when the Cornwall Canal was completed.

The inference which the deponents probably intended we should draw from the affidavits is, that the loss of that business to the people of the village, gave a check to its prosperity, and made property there, in consequence, less valuable, and that the claimants were allowed compensation for that by the award; which it has been contended in the agreement was a head wholly inadmissible. But the affidavits do not any where contain the statement that the arbitrators did allow for for such supposed damage; we are called upon to assume that they did; while at the same time the affidavits which have been filed in support of this application, do contain statements of other damages which we think would well warrant an allowance in compensation. I mean the damage arising from a wide artificial canal having been constructed where there was nothing of the kind before, leading the water from the river above the village, and cutting off by it the main provincial road which used to run through the centre of the village, and by which the

proprietors of land in the village could before freely pass and repass to and from the surrounding country. These same proprietors can now only go from their property to the surrounding country by passing through a narrow dark culvert, and by a route circuitous in regard to most of them, reach the present main road from which the village along its whole extent is cut off by the canal.

Now if it were shewn, which it is not, that the 75*l.* awarded to John Daly, for instance, was given to him as a recompense for the first supposed injury, that is the general depreciation in the value of property in the village, in consequence of the improvement in the navigation dispensing with the occasion for land carriage, thereby depriving the people of the village of a great source of employment in transporting the merchandize, and stopping the further circulation of large sums of money occasioned by it, we should have to pause before we could say that the arbitrators had acted illegally in giving compensation for such a damage.

Did the claimant sustain a substantial damage from the cause alleged? would be the first question; and of that the arbitrators are the proper judges. If they should find he did, could we say on clear ground that it would not be *consequential damage "to property, arising from the construction or connected with the execution of the Cornwall Canal?"*

When the legislature have expressly said "direct" or "consequential," they put it out of our power to hold that the damage must be shewn to flow in some manner directly from the construction of the work.

It is hard indeed, for us to assign limits to the words "consequential" and "connected with the execution of;" they seem designed to include every possible damage to the property that can be traced to the canal. They shew a willingness in the legislature to leave no one a sufferer in regard to his property in consequence of the construction of the work in question, but to provide for any claim he might have being liberally entertained and decided upon.

If they meant less, they should have used a more prudent reserve in the language employed, for they might be sure that the widest construction would be contended for. If they intended that the very widest latitude should be allowed to the arbitrators, I do not see how they could well have used words that would have expressed that intention more strongly. And without determining what we might have held if the compensation had been shewn clearly to have been awarded on such grounds, I will remark, that it could never be safe to expect that this court can, by the application of an arbitrary restriction, confine the sense

of words in a statute, which seems to have been purposely made as comprehensive as they well can be. It would appear unreasonable to imagine that the legislature really intended that compensation should be made from the public funds for the kind of damage alluded to, proceeding from a valuable public improvement; for there is no end to the extent to which such claims might be carried, and on very plausible grounds. In point of fact such injuries, we know, are not in general compensated, though they must follow more or less from almost every great improvement. Any facilities afforded by new inventions or improvements, will generally have the effect of throwing some persons out of employment who used to find occupation in performing the same work in a less convenient manner. But it cannot be said that such grounds of claim are never considered, for in the statute which provided for the building of Blackfriars Bridge, in London—29 Geo. II., ch. 86, (see Hunter's History of England, 685) the corporation was empowered to treat with the Waterman's Company about a recompense in lieu of the Sunday's ferry from Blackfriars' stairs to the opposite shore; and other cases might be found which it would be hard to distinguish from such a claim as I am now speaking of, though, no doubt, the general principle and usage in such cases are against it. But left as we are, uninformed by any thing before us, that any part of the 75*l.* in this particular case or any part of the sum awarded in any of the other cases, was given upon such a ground, we must dismiss from our mind all that was said on that point.

Then as to any other ground of alleged damage spoken of, the affidavits speak only negatively. They state that the deponents are not aware of any other damage "which the claimants have received by the canal, unless the old road being stopped up, and the diversion of the travel to the new road, and then having to go by the culvert to the present main road, can be considered a damage." They do not state that the compensation or any part of it was awarded on that ground; and if they did, we are not of the opinion that it would be illegal, considering always the very comprehensive language in these particular statutes, which would seem almost to have been intended, and which for all we know may actually have been intended, to admit these very claims. It cannot be denied to be at least a "*consequential injury*" to property, arising from the canal, that it has been cut off from the main road, whereby the village in which the property stands has ceased to be a thoroughfare; and that it has been placed in a insulated position, cut off from the adjacent country by a wide and deep artificial canal, which has to be crossed by a narrow culvert at one end of the village. Be-

fore that canal was made, people could freely pass from every lot in the village directly into the country by a broad public road, accessible to each lot. The deterioration in value of property which must be occasioned by the change, is certainly not imaginary; and if the arbitrators have allowed 75*l.*, wholly or in part for the injury spoken of, we have no data before us on which we can say that the allowance is excessive; nor would it follow, if we considered it excessive, that we could therefore properly set aside the award. That is a ground which can be acted on only to a limited extent. The award must be such as to shew clear misconduct and partiality—it must be outrageous—before we could interfere merely on the ground that we think the arbitrators gave too much. It is their judgment, not ours, that is to determine the value of the property and the extent of damages. If this were a case between party and party, we could not act on anything that is shewn against this award. The statute is clear on that point.

This also disposes of the 4th objection, that the damages are excessive and unjust; we cannot say that they are, for we have no means of judging, if we were the proper judges.

The 5th objection is, that the award does not shew that the work which is said to have occasioned the damage, was a "public work heretofore undertaken, commenced or performed, at the expense of this province or of Upper or Lower Canada."

This objection refers to the 25th clause of 9 Vic., ch. 37; but surely it was not necessary that the award should tell us, that the Cornwall Canal, or in other words the St. Lawrence Canal, is a public work, undertaken at the expense of Upper Canada, before that act was passed.

The fact of the Governor and council having referred the claim to these arbitrators, is an admission that the case was one that came under the statute.

As we do not find any clear ground which would justify us in interferring with these awards, it is necessary to consider whether the application was made too late, that is, after a whole term had intervened. Whatever effect the negative provision in the 9th Vic., ch. 27, sec. 29, might have on such a question—that is, that no award shall be set aside in any such case, unless moved against within a year,—it applies, I think, equally to awards made in Upper as in Lower Canada.

All the awards, except that in McNairn's case, seem to stand on the same ground, except that in regard to two of them, the affidavits state that the claim was partly for land taken. There could be no doubt that that would be a claim of the most direct kind, and so far those awards would be less open to objection than the others.

The affidavits seem intended to support a complaint, that though the arbitrators received evidence of property taken for the use of the canal, as well as of other damage done, and (as the deponents believe) included the value of the land taken, in the estimate of damage, yet they have awarded only as "*for damage done to property.*" Nothing of the kind however is relied upon in the rule, and if there was anything in the exception, it would be contrary to the general practice to entertain it; but at any rate, no such exception is supported, for if the arbitrators received a claim for property taken, and have clearly allowed nothing for it in their estimate, there is no injury to the party moving against the award.

I am of opinion that all the rules must be discharged. Whether the awards are, or are not, in fact just towards the public in all points, we are not able from the information before us to judge. They may have been excessive in some instances, but no ground is shewn on which we could properly set them aside. They are awards made by the arbitrators appointed by the government—made under statutes which give them very comprehensive and indefinite powers, as regards the description of damage for which they may award compensation. They are not on the face of them illegal, and no ground is shewn on affidavits, or otherwise, on which we can hold them to be so.

MACAULAY, J.—Assuming that the court can, by virtue of the statute 9 Victoria, chap. 37, sec. 24, exercise jurisdiction over the award, without a necessity for the submission or award (see statute 3 Will. IV., ch. 17, sec. 22) being made a rule of court—still I certainly think, that when an application is made to set aside an award on the grounds taken in these cases, the application of the party to the commissioner of public works, under the statute 10 & 11 Vic., ch. 24, sec. 3—of the sums (if any) tendered by the commissioner thereunder, and of the order of the Governor in council under the statute 9 Vic., ch. 39, sec. 25, referring the claims to the arbitrators appointed under the 24th section of that act—should be shown; for without them the subject-matter of the reference does not appear.

The wards seem perfectly good on the face of them; and though pointed at, the affidavits do not shew that claims for damages, by loss of the carrying business at Milles Roches, were prefered, or entertained, or allowed.

According to a strict interpretation of the act, the time for applying to set aside an award would be limited to the same period as in cases under the statute 9 & 10 Will. III., ch. 15, under the statute 9 Vic., ch. 37, sec. 24, which subjects awards to the jurisdiction of the courts in like

manner and to the same extent, and under the same regulations as apply to the arbitrations by submissions of the parties. It is, however, susceptible of a more enlarged construction, so as to allow the application to be entertained at any time within a year (see 4 & 5 Vic., ch. 38, sec. 21), and in this construction I concur.

As to what may constitute consequent damages to property arising from the construction or connected with the execution of the canal (10 & 11 Vic, ch. 24, sec. 33), no facts are before us to which to apply the statute, for the affidavits of Messrs. Keefer and Macdonell do not assert that the arbitrators entertained any such claims, or have in their award allowed damages for any such loss or prejudice. It is unnecessary, therefore, to express any opinion upon the construction of the act in the abstract; I will therefore merely remark, that while the statute 4 Will. IV., ch. 40, sec. 5, empowered the commissioners of the St. Lawrence Canal to alter any highway, and to cause to be made another public road, and to satisfy any persons for all claims which they might sustain in consequence of such alterations, in the same manner as other claims were to be satisfied under the 3 Will. IV., ch. 17—the cases of *Rex* v. *Commissioners of the Nene-outfall*, 9 B. & C. 875; 4 M. & R. 646; *Rex* v. *The London Dock Company*, 5 A. & E. 163; and *Rex* v. *The Hull Dock Company*, 11 Jurist, 15, and others there referred to, shew that the canal, putting an end to the transportation of goods by land carriage past the Milles Roches rapids, did not constitute any ground for damages, but that to entitle a party thereto, the damages must arise from the infringement of some vested right in analogy to cases in which actions at law are sustainable for consequential damages, in like cases between the owners of property, and a tort feasor. The inhabitants of the Milles Roches village had no monopoly or legal or vested right to convey goods by land past the rapids, and the loss of such business, by reason of the canal, would not constitute a legitimate ground of damages under the statutes; but they had a vested right in relation to the high road, and its obstruction and diversion manifestly caused consequential damages to their property as affected thereby, and for which they are clearly entitled to compensation.

The foregoing observations apply to all the awards. As to that in favour of McNairn, it is sufficient in itself; and the affidavits filed in his behalf repel the allegation against it, that the arbitrators had allowed him for lands or damages already compensated for. As respects the awards in favour of George Robinson and Israel Brooks, it does not follow that because they claim for land taken, that the language of the award (being for damages done to their property by the construc-

tion of the canal) is not comprehensive enough to include it, as it is alleged to have done in fact—nor is the matter really submitted shewn in a regular way, as already mentioned.

SULLIVAN, J.—The first question to be settled relates to the time at which these motions are made, the awards which are sought to be set aside having been made in the month of March, 1848, and the motion not made till Trinity Term, and not within the next term after making the award.

The cases do not come within the strict terms of the act 8 & 9 W. III., ch. 15, as the submissions are not made rules of court. (*a*)

The courts have, however, in numerous cases adopted the statutory limitation, as conveniently applicable to other cases, relaxing it only under very special circumstances.

Awards illegal on the face of them may be objected to, and refused to be enforced at any time, but they cannot be set aside.

When verdicts are taken, subject to awards, they must be moved against in the first four days of the ensuing term to the award, where the cause only, and nothing else, is referred.

The statute 9 Vic., ch. 37, sec. 24, directs that three arbitrators or appraisers shall be appointed for Lower Canada, and three for Upper Canada, who shall, within the portions of the province for which they are appointed, arbitrate on, appraise, determine and award the sums which shall be paid to any owner or owners for the land or real estate which it may be necessary to take, or as compensation for the loss or damage which may accrue to them from the construction of public works, and with whom the commissioners cannot agree. Provided always, that the dicision of the said arbitrators shall be subject to the jurisdiction of the supreme courts of law and equity within the jurisdiction whereof such arbitration shall have taken place, *in like manner, and to the same extent and under the same regulations, as apply to arbitrations by the submissions of the respective parties;* and any award made under this act in that part of this province formerly Lower Canada, shall be liable to be set aside at the instance either of the commissioners or of any party interested, by the judgment of any court of competent jurisdiction in that part of the province, if the court shall be of opinion that *injustice has been done,* and that the value of land, real property, or rights, in which the award was given, shall be finally determined by the judgment of the said court. Provided always, that no such award shall

(*a*) See the several decisions upon this Statute enumerated in Harrison's C. L. P. Acts, p. 167, note *r*.

be set aside in any case, unless the application to the court shall be made within one year from the date of the award.—See 4 & 5 Vic., ch. 38, sec. 21.

It is argued on the part of the parties who appear to sustain these awards, that the limitation as to time given by the statute only applies to Lower Canada, because in that part of the province no such limitation existed previously, and because the words "such award" refer to the last antecedent, and because in dealing with the awards in like manner and subject to the same rules and regulations as apply to arbitrations by the submission of the *respective parties*, the courts in Upper Canada would fix a much shorter period within which a motion must be made to set aside an award.

It appears to me that the proviso cannot be limited so as to apply only to Lower Canada; it is sufficiently comprehensive to apply to all awards mentioned in the clause, which goes on further to enact a provision evidently applicable to both sections of the province. There is in fact no statutory limitation of time for moving to set aside these awards, or such awards as these, in Upper Canada more than in Lower Canada; although the courts have, in cases not falling within the 9 & 10 Will. III., adopted for convenience the time given by that act. Then the proviso does not enact that any time shall be given, but I think it was intended to limit the discretion of the courts in both sections of the province, as to the longest time that was to be given, and to limit them both equally. It may be that the court, in either portions of the province, may at their discretion shorten the time for the application; but I do not think that they can *in any case* lengthen it, or that this can be done in Upper Canada any more than in Lower Canada.

I find in the case, *Potter* v. *Newman*, reported in 1 Tyr. & G. 29, a construction given to the statute 3 & 4 Will. IV., sec. 39, exactly in accordance with my construction of this act. The words *any such arbitrator*, adjudged in that case to refer to the words any arbitrator, in the beginning of the section, are as intimately connected with an intermediate enactment as in the present instance; and if they were referred to the last antecedent, as was contended for in that case, as in the present, the power of the court to enlarge the time for making an award would have been limited to cases where an attempt at revocation had been made. The court, however, decided on the reference of the words to the first part of the section, retracting an opinion expressed when the rule nisi was moved; and the construction then given to the clause was afterwards adhered to.—See *Burley* v. *Stephens et ux.* 1 M & W. 156.

If my construction of the 24th section 9 Vic., ch. 37, be correct, the court would still have the discretion to apply or forbear to apply the rule of practice, adopted by analogy to the statute of Will. III. to cases between the crown and the subject, over which they are given special jurisdiction by this act. The maxim *nullum tempus occurrit Regi*, would seem to forbid a constructive limitation to the rights of the crown, arising from arguments of convenience; and apart from the notion of prerogative privileges, there are many reasons why the public interests should not be dependant upon the watchfulness of public servants, as the rights and interests of individuals are made to depend upon their own care of their own affairs. In theory, no neglect or default of a public officer, should affect the rights of the crown or of the public; and in practice, it may be easily conceived that matters belonging to the details of government cannot by any possibility always engage immediate attention, as the private concerns of individuals may and are supposed to do. The fact that awards had been made in the present instance, if reported to the government in time, and also the fact of the injustice or exorbitancy of the awards, might be excluded from the attention of the government by more urgent matters, so as to cause a term of this court to pass by without an appeal, however just or right an appeal from the award might be. And as the statute does give a limitation of time, by which the crown and the subject are equally bound, I cannot bring myself to the conclusion that the rule of practice adopted in cases of arbitrament in England, as between private parties, and followed in like cases in this court, should be held applicable to public proceedings, for ascertaining the respective rights of the crown and the subject (*a*).

(*a*) The law determines that in the Crown there can be no negligence or laches, and therefore it was formerly held that no delay in resorting to his remedy would bar the King's right (1 Bl. Com. 247), for the time and attention of the Sovereign must be supposed to be occupied by the cares of government, nor is there any reason why he should suffer by the negligence of his officers, or by their fraudulent collusion with the adverse party (Bac. Abr. Prerog. E. 6), and although the maxim *vigilantibus non dormientibus jura subvenient* is the rule for the subject, yet *nullum tempus occurrit regi* is the sovereigns plea (Hob. 347). From this it followed that not only the civil claims of the Crown received no prejudice by lapse of time, but that criminal prosecutions for felonies and misdemeanours (which are always brought in the Sovereign's name) might be brought at any time after the offence. This is to some extent still law, qualified however by the 9th Geo. III. ch. 16, which provides that adverse possession of landed property for sixty years bars the Crown, *Regina* v. *McCormick* (18 U.C.Q.B. 131), *Watt* v. *Morris* (2 Scott, 276), *Goodtitle* v. *Baldwin* (11 East, 488), *Doe dem Wm. IV.* v. *Roberts* (13 M. & W. 520); also by 32 Geo. III., c. 58, by which the Crown is barred in informations for usurping corporate offices or franchises in six years, *Regina* v. *Harris* (11 A. & E. 518). Also by 7 Wm. IV cap. 3, by which an indictment for treason (except an attempt to assassinate the Sovereign) must be found

If this court at this time have a right to entertain this motion, and think it just to do so, it is next to be considered what are the nature of the claims which the arbitrators have a right to allow. The 24th section, which I quoted above, gives them authority to arbitrate and determine, appraise and award the sum and sums of money which shall be paid to any owner or owners, occupier or occupiers, &c., *for the land or real estate for which it* may be necessary to take for the use and purposes of the said public works, or as compensation for any loss or damage which may accrue to them from the contractor of such public works, or any of them, and the 26th section enacts that it should be lawful for the Governor in Council to refer to the said arbitrators, for their decision, any unsettled claim or claims for property taken, or for alleged *direct or consequent damages to property*, arising from the construction or connected with the executing of any public works, in any part of this province, heretofore undertaken, commenced or performed at the expense of this province, or of either of the late provinces of Upper or Lower Canada. There is no enactment in this statute as to the nature of the damages to be allowed for, no direction to the government or to the arbitrator as to the claims which owners of property have a right to insist upon—and other statutes must be referred to for this purpose, or such a construction must be given to this one, as to enable the arbitrators not merely to appraise the amount of damages which by law the parties have a right to claim, but also to legislate as to the nature of the damages to be allowed. If there were no enactments limiting and defining the nature of their rights, the court might be driven to give the wider and more dangerous construction to this act, but if we find the allowances to be made to owners of property defined in their nature by other enactments, it cannot be that the constitution of a court for the adjudication of all or any claims for alleged damages, gives that court the power to create new rights, or to consider as good claims all which claimants choose to prefer, or any at the mere discretion of the court. All courts are established for the adjudication of claims, of some kind or other, but the nature and foundation of the claims to be allowed depend upon enactment where there is enactment, or upon rule of law equivalent to enactment, and not upon words giving jurisdiction to the court; and it is not because a court is appointed for the decision of all claims that it has authority to allow claims which the

within three years after the commission of the act of treason. But the Statute of Limitations (21 Jac. I. cap. 16, sec. 8) does not bind the Sovereign, *Lambert* v. *Taylor* (4 B. & C. 151, 152); nor can the Crown be bound by any statute, unless expressly declared to be so bound, (Con. Statutes Canada, ch. 5, p. 31.) *Willion* v. *Berkley*, Plowden's Rep. 289.

law does not otherwise recognize, and as it appears to me it is not because the arbitrators are appointed to consider any unsettled claims for alleged direct or consequent damages to property, arising from the construction of public works, that they are to be considered as having authority to create new species of claims, or new kind of damages, to which claimants are to have a right.

Now the Statute of Upper Canada—3 Wm. IV., ch. 18—which authorizes the construction of the St. Lawrence Canal, directly gives the commissioners the right to set out and enter upon the land of individuals, to set out and ascertain what would be necessary to be taken for the canal, and also for materials, and to agree for the purchase of the property with the owners, and also for such damages as the owners of land may be entitled to receive in consequence of the intended erections being made *in or upon his or her respective lands.*

When no agreement is made, or when the parties cannot agree, a mode is provided for leaving the matter to arbitrament, and for its being finally settled by a jury.

The damages are here confined to property taken or injured by works in and upon property: no damages are allowed for the obstruction of highways, or other rights of way. The reason for this omission is obviously, that the legislature did not contemplate the necessity of any serious obstruction; for the 31st section provides, that when it shall be necessary to cut into any highway, in order to conduct any of the said canals thorough the same, the commissioners shall cause to be constructed, within one month, a commodious bridge, in order to re-establish the communication between the several parts of such highways.

It seems, however, to have been found necessary to provide for the alteration of highways; and by the statute of Upper Canada, 4 Will. IV., ch. 40, sec. 5, it is enacted that "it shall and may be lawful for the commissioners, when it shall be necessary for the purpose of carrying on the works, to alter any highway, &c., and it shall be the duty of the commissioners to cause to be made for the accommodation of the public a road, equally good and as convenient as the circumstances of the place will allow, and to satisfy any person or persons whomsoever for all damages which he or they may sustain in consequence of such alteration, in the same manner as other damages are ascertained and satisfied under the former act."

The sixth section of this act, 4 Will. IV., provides for the valuation and payment for houses necessary to be removed.

These acts of Upper Canada give the commissioners authority to interfere with private and public rights of property and of way, neither

of which they could have done without the authority of parliament, unless under the liability to indictment or to private action: the injury to the public is avoided by making it obligatory on the commissioners to make other roads, as convenient as those obstructed or altered; and step by step as the commissioners are authorized to interfere with private legal rights, a mode of compensation is pointed out. I do not think it ever could be imagined that the damages mentioned in the 5th section of the 4 Will. IV., extended beyond those for which the injured party would have had an action at law, were there no statute authorising the rights of the commissioners. The establishment of rival communications or of rival commerce, which would injure that already established, was not in contemplation of the legislature, neither was loss of neighbourhood, for those through whose property the canals were not expected to run, were liable to suffer from these causes equally with those especially provided with a recompense; and moreover, it required no act of parliament to enable the commissioners or other parties to establish rival commerce, or new neighbourhoods, or new modes of transport or communication, except in so far as legal rights were interfered with.

The distinction between direct and consequential damages is well understood in law, and for both or either, actions at law may be maintained. The direct damages authorized to be inflicted and compensated for by the two acts of Upper Canada, are those arising from the works being constructed on, in, through, or upon property, and by the destruction of houses. The consequent damages, for which an action on the case would lie, are those arising from the closing roads or means of communication affording access to property, and by the closing of which individual owners would be particularly injured, so as to have a private remedy, apart from the public one by indictment.

Thus we have it established, that before the act 9 Vic., certain persons suffering certain defined, direct, or consequent damages, were entitled to compensation. The abolishment of the commission under which the canal was commenced, made it necessary to provide another means through which the compensation was to be obtained, and this is all that is done by the new statute 9 Vic., nearly re-enacted by the 10 & 11 Vic.

The statute 9 Vic., ch. 37, sec. 24, with this view, directs the appointment of arbitrators, to appraise the value of property taken, and the compensation for damages which may accrue to the owners of property, from the construction of public works, with whom the commissioners could not agree. But the commissioners were only authorised

to agree to compensation for such injuries as the former statute provided for; and it cannot be supposed that the arbitrators were intended to be given any power of allowance which the commissioners had not. The 25th section, which authorises the Governor in council to refer claims to the arbitrators, expressly refers to *unsettled* claims for direct or consequent damages. These must be claims of a nature which the former statutes had provided for. They might be both direct and consequential, and yet defined in their nature; and there is therefore no pretence for saying that, by implication, the arbitrators were by the new act invested with plenary powers to assess as damages things not authorised by the former statutes to be so considered, or any things arising from acts of the commissioners not requiring the authority of parliament, as against the claimants. To give any such constructive authority to arbitrators, or to courts, or to the executive government, or to any power under the authority of parliament itself, would, as it appears to me, be a dangerous and unprecedented proceeding; it would be recognizing, through mere construction, a delegation of wide and indefinite authority to deal with great public interests, which I cannot bring myself to believe the parliament ever contemplated.

The case of *The King* v. *The London Dock Company*, 5 Ad. & El. 163, 6 N. & M. 390, appears to me to warrant the distinctions I have taken between injury, the remote consequence of a public works, arising from acts in themselves legally justifiable, and injury, arising from acts which require for their justification the authority of parliament. By the former, the owner of property loses nothing but what others had an equal right with himself to enjoy as circumstances permitted; by the latter, rights peculiarly his own are interfered with, and for that reason he is entitled to compensation; and it is only these latter that are considered injuries to the estate and interest of the owners of property. If, as it is suggested on the part of the crown, the arbitrators in the present cases took into consideration injuries arising to the owners of land in the village of Milles Roches, arising from the diversion of traffic, or loss of neighbourhood, caused by the opening a new road, or by a change in the carrying trade, caused by the canal, for neither of which an action at law could be maintained if there were no act of parliament on the subject, then I have no doubt they transcended their authority. But the difficulty is, that we have before us neither the particulars of the claims, if they were furnished under the 10 & 11 Vic., ch 24, sec. 3, or as they were laid before the arbitrators by command of the Governor in council; and we have no means of knowing upon what evidence, or for what damage, the awards were made. The awards merely recite

the clause in the statute, and the fact that the parties respectively had preferred a claim for damages done to their property by the construction of the Cornwall Canal; and they award certain sums of money to be paid for damages done to property by the construction of the canal. The affidavits filed on the part of the commissioners go in part to negative the fact of injury by the construction of the work, except as to the stopping and obstructing the highway, and substituting for it a tunnel under the canal, by which an inconvenient access is had to the property in question. This no doubt is a substantial injury, probably not warranting the amount awarded, but, for ought we know, other substantial injury may have been claimed and proved; and if these cases are to be decided by the same rules that govern private arbitrations, I do not see how the court can intend that the damage by altering the highway was the only one proved. The map before us would perhaps show that the canal does not run through, in, or upon, the premises in respect of which damages are claimed; but materials may have been taken, houses pulled down, or other injuries done, of which we have no knowledge. The affidavits state that, as the deponents believe, no other damage was sustained, except through the means of altering the road; but they do not state that none other, of a nature to constitute a legal claim, were submitted and attempted to be proved; neither do they state that injuries not capable of appraisement, or within the scope of inquiry of the arbitrators, were actually submitted or considered as submitted by the arbitrators, so as to enable us to set aside the awards on the ground of misconduct or excess of authority.

McLEAN, J., gave no judgment, having been concerned while at the bar in matters connected with this application.

DRAPER, J., being in the Practice Court during the argument, gave no judgment.

Per Cur.—Rule discharged. (*a*)

(*a*) The several statutes of this Province relating to the management of the Department of Public Works, and the appointment of arbitrators, are the following:

17th August, 1841. Act 4 & 5 Vic. c. 38, gave power to the Commissioners of Public Works to appoint one arbitrator, and the owner or person representing the owner of any property where damage has been done, to appoint another.

9th June, 1846. Act 9 Vic. c. 37, authorizes the Governor in Council to appoint three arbitrators for each section of the Province.

28th July, 1847. Act 10 & 11 Vic. c. 24, has no reference to the mode of appointing arbitrators.

10th August, 1850. Act 13 & 14 Vic. c. 13, exempted the Commissioners and the Government from legal liability.

14th June, 1853. 16 Vic. c. 160, authorized the Commissioners to refer claims to other arbitrators than the Provincial Arbitrators.

The Act now regulating arbitrations as to public works is Consol. Statutes of Canada, cap. 28. See s. 46 *et seq.* p. 316.

Blue v. Gas & Water Company.

Corporation—Assumpsit—When corporation must contract under seal.

Held per Cur.—That an action of assumpsit would well lie against the Gas Light and Water Company of the City of Toronto, for damages, in not fulfilling a *parol* agreement with the defendant, for the supply of water to the Toronto Baths.

Robinson, C. J., *dissentiente.*

This action was brought in assumpsit for the recovery of damages from the defendant, for not fulfilling a special contract for the supply of water to the Toronto Baths, which were kept by the plaintiff.

The declarations contained four counts, in none of which did it appear that the agreement was in writing or under seal.

Demurrer to declaration :—1st, because the agreement, in each of the courts mentioned, ought to be under seal—and it is not so shewn; 2ndly, because the defendant being a corporation, could not make the said agreement except under their corporate seal.

Cameron, Q. C., for the demurrer. *Phillpotts*, contra. The authorities cited were—8 Q. B. R. 326; 4 C. & P. 111; 3 B. & A. 125; 1 Cambp. 466; 2 Saund. 302; 1 A. & E. 526; 10 A. & E. 210; 6 C. & P. 608; 1 Saund. 305; 2 New Cases, 156; 4 B. & C. 962; 5 A. & E. 529, N. S.; 5 M. & Gr. 131; Smith on Contracts, 239.

Robinson, C. J.—I am of opinion that the authorities, by which we are bound, do not warrant us in holding that assumpsit will lie against a corporation on an agreement so special in its nature, and so considerable in regard to its object as that set out here.

The case of *Church* v. *The Imperial Gas Light Co*, 6 Ad. & Ell. 846, is, perhaps, the strongest case that can be cited in support of this action; but the decision does not go the length of sustaining it, and it is in part founded upon a repudiation of any distinction between executed and executory contracts as bearing upon the question, a distinction recognized and established by so many cases both before and after that decision, that I cannot feel myself at liberty to reject it (*a*)

(*a*) As a corporation aggregate consists of a number of individuals united in such a manner that they and their successors, constitute but one person in law, it is obviously impossible that it can contract in the same way as an ordinary person. Accordingly the law, whose creature it is, has provided for it a mode of contracting by its common seal, which, being affixed to the contract, authenticates it and makes it the deed of the corporation; and, as a general rule, that is the only way in which a corporation can contract. But to this rule, as to most other general rules, necessity and the convenience of the world has occasioned some exceptions; the principal of which is that where an act of Parliament has created a corporation for mercantile purposes, it is allowed to enter into certain contracts which are usually entered into without seal by commercial men. And there are also other acts of trifling importance which every corpora-

It is, besides, a distinction in itself highly reasonable, I think, and founded on good sense. It would be absurd to allow a corporation, any more than an individual, to receive and use the goods of another, or to enjoy the benefit of his labour, and then to say, "you must prove that I promised to pay you." The law dispenses, in such a case, with an actual promise—it implies it from the very nature of the transaction; and if the corporation or the individual were proved never to have promised to pay, but to have always resisted the demand, still the promise would be nevertheless raised by law.

But where a corporation or an individual is sued for not delivering or not accepting goods, there is nothing to raise an obligation to do the one or the other till an express agreement is shewn, for that alone creates the liability, and there is nothing in such case to connect the defendant with the subject matter of the action till a legal contract is shewn.

The agreement which the defendants here are charged with entering into, is not one in the ordinary course, though it does, to be sure, relate to the company's ordinary business of supplying water. In the case just cited of *Church* v. *The Imperial Gas Light Company*, the court did mainly rest their decision on the acknowledged principle, that acts of such ordinary occurrence as to be of daily necessity to the corporation, or too insignificant to be worth the trouble of affixing the common seal to every such act, may be done without that formality.

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tion may do without deed; for which see Comyn's Dig. Franchises, F. 13. The exceptions however cannot yet be said to depend upon any settled principle. In *East London Waterworks Company* v. *Bailey* (4 Bing. 283), they were laid down as follows: (1) Where the contract is executed. (2) Where the acts done are of daily necessity and too insignificant for the trouble of a seal. (3) Where the corporation has a head, as a mayor, &c., who may give commands. (4) Where the act should from necessity be done immediately. (5) Where it is essential to a monied corporation that it should have the power of issuing bills and notes. The distinction between executed and executory contracts, which was the foundation of the first of these exceptions, was directly overruled in *Church* v. *Imperial Gas Company* (6 A. & E. 846). That case, which decided that a corporation might maintain assumpsit for breach of an unsealed contract to accept gas from year to year at so much per annum, was founded on the second and fifth of the above exceptions, the contract being one of daily occurrence and almost essential—"convenience amounting almost to a necessity"—for the purposes of the corporation. This case has been followed by a number of others in England, and also in this province. In the United States, however, a much more relaxed rule has prevailed, and it has there been long settled that there is no distinction between the contracts of a corporation and a natural person, whether they are express or implied, either from acceptance of an executed consideration, or from the ratification of acts done on its behalf by its members or others. See *Bank of the United States* v. *Dandridge* (12 Wheat. 64); *Proprietors, &c.* v. *Gordon* (1 Pick. 297); *Ross* v. *City of Madison* (1 Smith's Ind. 98); *Gassett* v. *Andover* (12 Verm. 102); Angell and Ames on Corporations, 211; and Kent's Com. 290.

This principle is among those enumerated in *East London Water Works* v. *Bailey*, 4 Bing. 284—it is no modern innovation, but has the oldest and highest authority to support it; and it was much safer ground to rest upon than the rejection of the distinction between executed and executory contracts.

Then it is urged that if we admit the decision in the *Church* v. *The Imperial Gas Light Company* to be binding upon us, it must follow that we should hold the defendants capable of binding themselves by parol to such an agreement as that sued upon here.

I cannot concur in that, for this agreement is special—out of the ordinary course—not like the supply of one or two lights, or of water to a common dwelling at what we may assume to be a regulated rate of charge, and requiring nothing to be special to be considered and stipulated for or guarded against. The water was to be supplied for a bath-house—the defendants were alleged to have stipulated that they should not be required to furnish more than 2,400 baths in a year, and if more should be required, they were to have 4d., a puncheon for all after 2,400 baths had been supplied. It is true that it may be difficult to draw a precise line between what shall be regarded as ordinary commonplace trifling matters, and what shall be limited as special; but that courts are expected to draw the line somewhere, and that they have authority to judge of the circumstances, is too plain to be disputed: otherwise there could be no such principle or exception as we are now discussing, but there is that principle, and it has been and is continually recognized and acted upon.

I have no difficulty in saying that the agreement sued on here is one special in its nature—requiring certain terms to be considered, and settled with a view to particular facts out of the common routine of the defendants' business. I cannot call this contract one in the ordinary course of their business, merely because it is for the supply of water; otherwise I should have to hold that an agreement to supply all the inhabitants of a particular quarter of the town, or to supply all the water which might be required for the City Market, would not be an agreement out of the general course.

If the legislature should choose to relieve us by a change in the law, from considering those distinctions, by dispensing with the use of the corporate seal in any contract of a personal nature, we would have no objection; but as the law stands (*The Mayor of Ludlow* v. *Charlton*, 6 M. & S. 814), I do not feel warranted in going the length that would be necessary to sustain this action as it is laid.

As to its not being evident to the court whether the plaintiff is suing

on a deed or not, we cannot, I think, hold this to be an action of covenant, which it ought to be if the contract is one that could only be binding when made under the corporate seal. If this declaration had concluded, "and so the defendants have not kept their said covenant," I have no doubt the plaintiff could have demurred, because there had been no covenant set up; again, if the defendants had pleaded *non est factum*, I conceive their plea would have been demurrable, for we must clearly see that this declaration sets out no agreement under seal —5 M. & Gr. 133. (*a*)

MACAULAY, J.—The demurrer, which is general, admits the agreement declared upon, if binding in law on the face of the declaration, and the defendant in so demurring relies upon its invalidity, on the ground that it does not appear to have been under seal, but as stated must be intended to be a simple contract; it is not stated to have been under the seal of the defendants, nor does it appear that it was not under seal; wherefore the objection must be that the declaration is bad not because it appears to be a simple contract, but because the declaration does not allege the agreement to have been under seal.

In 16 East. 6, *Yarborough et al* v. *The Bank of England*—in trover against a corporation, a sealed authority to the party immediately guilty of the conversion, if necessary, will be presumed after verdict for the plaintiff. (*b*)

Tilson et al v. *The Town of Warwick Gas Light Company*, 7 D. & R. 376; 4 B. & C. 962—debt for work and labour and other common counts, and with special counts; on general demurrer, it was contended that all the common counts were founded on simple contract, to which it was answered, that the neglect to set forth the deed was mere matter of form, of which opinion was the court.

2 Saund. 305, a (13) necessary circumstances implied by law in a plea need not be expressed, as that a sheriff's warrant was under seal—Cro. Eliz. 53; 4 B. & C. 525–7, *Price* v. *Seaman*; 1 Bing. N. S. 633; *Burnett* v. *Glossopp*.

(*a*) All the modern cases bearing upon the points referred to in this judgment will be found in the case of *Whitehead* v. *Buffalo and Lake Huron Railway Company* (7 Grant's Ch. 351), where the Court of Chancery held that a contract for the construction of a railroad, by means of which the business of the Corporation was to be carried on, need not be under seal if executed and the work accepted by the Company, and that the contractor was entitled to be paid according to certain stipulated prices, and not a *quantum meruit*. The case is now in Appeal.

(*b*) Trespass will lie against a Corporation.—*Eastern Co. R. Co.* v. *Broom* (6 Ex. 314) and *Roe* v. *Birkenhead R. Co.* (7 Ex. 36). See also *Stevens* v. *Midland Counties R. Co.* (18 Jur. 932) and *Eggington* v. *Mayor, &c., of Lichfield* (1 Jur. N.S. 908).

The Fishmongers' Co., v. *Robertson et al.*, 5 M. & G. 152. The plaintiffs brought an action of assumpsit founded on an agreement, which, on the face of the declaration, was alleged to be *an agreement in writing*. The defendants among other things pleaded that it was not under the seal of the plaintiff's. Special replication, rejoinder and demurrer, at page 172, *per* Maule, J., referring to prior cases decided on the plea of non-assumpsit, said, that in this case, the plea was that there was no agreement; the declaration states an agreement, and if the plaintiffs could not agree except by deed, that allegation in the declaration may be held on general demurrer, to mean that the plaintiffs promised under seal, &c. Tindal, C. J., however, remarked that it would appear upon the whole record in that case, that the promise was made by simple contract; so also at p. 191, in delivering the judgment of the court, he said that from the statement of the contract itself on the face of the declaration, &c., it might be inferred that the common seal of the plaintiffs was never affixed thereto; further, that a corporation by bringing an action on a simple contract, still executory on their part, would be stopped by the record from afterwards objecting, in a cross action, that it was not sealed with the common seal.

Now, in the case before us, the declaration contains four special counts and no other, and there is nothing on the face of it to shew expressly that the agreement is by simple contract and not under seal; consistently with all that is stated it may have been executed under the defendants' common seal, and the contrary does not clearly appear, as in the case lastly above mentioned.

It is not precisely like the case in 4 B. & C. 962, or indeed any of those cited above; but if upon a plea denying the agreement alleged *modo et forma*, the plaintiff would be bound to prove a sealed agreement, it seems to follow that the general demurrer admits it; for, till the contrary appear, the presumption must be that there was a valid agreement, not that it was invalid—that it is (if necessary) under seal, not that it is not; a plea in confession and avoidance might admit such an agreement in fact, and avoid its legal or binding effect by alleging that it was only a parol contract and not under the defendants' seal. But it is now held, 10 M. & W. 393, *Leaf* v. *Tuton*, that a plea that the contract declared on was not in writing, though required to be so under the Statute of Frauds, is bad, as amounting to the general issue, or general denial of the agreement, because a plea of general denial would throw upon the plaintiff the onus of proving a written contract. So here, if in the face of the declaration, the agreement stated is one that would not bind the defendants unless entered into

under their common seal, a denial of the agreement would require the plaintiff to prove a sealed contract, or he would fail on that issue. Now, whether if denied he could or could not prove it, is in these pleadings a question of uncertainty; enough does not appear to shew, that consistently with the declaration, he could not do so, without varying from the contract alleged. I am, therefore, not satisfied the declaration is bad on general demurrer, on the ground that if necessary to its validity, it must be intended that the agreement was under the defendants' seal, since the pleadings do not clearly evince the contrary —see *Hamilton* v. *Niagara Dock Company*, in our court.

Assuming, however, that the intendment should be the other way, and that the court must take notice that the plaintiff is declaring on a simple contract, to which the defendants thereupon except as not binding upon them in law; I am (though not without much doubt) disposed to to think it sufficient. The cases applicable to this question are numerous and not consistent.

The result of them seems to me to shew—

1st. That there is no substantial difference between debt and assumpsit—that is in the form of action, so far as respects the efficacy and binding validity of simple contracts, or of simple contract demands—4 Bing. 75, *Mayor of Stafford* v. *Tilt*, and per Patteson, J., 6 A. & E. 72.

2ndly. That there is no difference between executed and executory contracts—see 4 Bing. 75, supra; 4 Bing. 283; *The East London Water Works Company* v. *Bailey*; *Beverly* v. *The Lincoln Gas Light and Coke Company*, 6 Ad. & E. 829, and *Church* v. *The Imperial Gas Light and Coke Company*, 6 Ad. & E. 846—or between contracts or promises express or implied by law.—*Ib.*

3rdly. That trading Corporations may, in many cases, sue or be sued in assumpsit. (*a*)

The defendants are appointed under the statute 6 Wm. IV., c. 69 (see seç. 8, and 4 & 5 Vic., ch. 65 (sec. 6 & sec. 11), which make no special mention of contracts, and the recent cases in England more especially important, are—6 Ad. & E. 829, *Beverly* v. *The Lincoln Gas Light and Coke Company*; 6 Ad. & E. 846, *Church* v. *The Imperial Gas Light and Coke Company*, in error; 6 M. & W. 815, *The Mayor of Ludlow, &c.*, v. *Charlton*; 4 Jurist, S. C. 5 Q. B. 526,

(*a*) See *Henderson* v. *Australian Royal Mail Steam Navigation Co.* (1 Jur. N.S. 830), *Australian Royal Mail Steam Navigation Co.* v. *Marzetti* (24 L. J. Ex. 278), and *Reuter* v. *Electric Telegraph Co.* (2 Jur. N.S. 1246).

Hall v. *Mayor of Swansea;* 8 Jur. 213, S. C. 657; 5 Bing. N. S. 270, *Gibson* v. *E. I. Company*, and Tindal, C. J.

The second case—6 A. & E., very much resembles the present, except that there the Corporation were plaintiffs in the palace court of Westminster, against the plaintiff in error, upon a single contract executory for the supply of gas. The defendants in error complained, in their declaration below, that the plaintiffs had agreed to take from them, and that they had agreed to supply them with gas sufficient for two lights for one year, from a day named, and so from year to year, at the rate of £12 16s., per annum therefor; then after avering mutual promises of performance, and readiness, &c., they assigned for breach, that though ready to supply, &c., for the quarter, from 1st October to 31st December, 1834, yet the defendant did not accept, or pay, or give three months' notice of his intention to discontinue according to the terms of the agreement; plea, non-assumpsit; another plea; and verdict for the corporation. In giving judgment, Lord Denman used language equally applicable to the present case. In overruling *East London Water Works Campany* v. *Bailey*, 4 Bing. 283, so far as it rested upon a distinction between contracts executed and executory, he said it was sustainable on other grounds—as the Court of Common Pleas might reasonably have held that a contract with a water-company for the supply of iron pipes, was neither one of so frequent occurrence or small importance, or so brought within the purpose of the incorporation, that the principle of inconvenience required it to be taken out of the general rule, viz., that a corporation contracts under its common seal: again, on the face of this record we must understand this company to have been incorporated to supply individuals willing to contract with them for gas light and coke, and the present appears to have been a contract for the supply of gas for a year, amounting to £12. 16s., and so from year to year. We cannot be ignorant that such contracts must be of frequent and almost daily occurrence, and to hold that for every one of them, of the same or less amount (for where the sum is so small, a diminution of half would not vary the principle, which principle he had previously stated to be convenience, amounting almost to necesssity), it was necessary to affix the common seal, would be so seriously to impede the corporation in fulfilling the very purpose for which it was created, that we think we are bound to hold the case fairly brought within the principle of the established exceptions.

6 M. & W. 815, was a case of covenant by the plaintiffs, to which the defendants pleaded a set-off of £500, for pulling down and altering the site of a house, and altering the roadway there, and for work and

labour, &c., to which the replication took issue; and on the evidence the plaintiff objected the want of a seal to the contract relied on by the defendant. Rolfe, B., delivered the judgment of the court, and his remarks are certainly calculated to weaken the force of the decisions in 6 A. & E. 846—and to restrict rather than to extend the doctrine contended for and adopted in these cases. It was however the case a of municipal, not a trading corporation, and in relation to a transaction peculiar in its nature, and quite without the ordinary business and affairs of the body corporate. (*a*)

5 Q. B. 526—was also a case of assumpsit against a municipal corporation, and the action (for money had and received) was sustained on the ground of necessity—Lord Denman referred to the case of 6 M. & W. 815, and said: "we are not to regard the circumstances of particular cases, but to look at the governing principle, and that is necessity—the only proper ground on which these actions, in the case of corporations aggregate, can be placed:" again that "the true ground is necessity, which ground was (satisfactorily) shewn to exist there."

The cases of *Hamilton* v. *The Niagara Dock Company; The Kingston Marine Railway* v. *Phillips et al.; Davis* v. *Grand River Navigation Company*, are cases in this court, and material.

Now looking to the objects for which the defendants are incorporated, it will be seen that the purposes contemplated are the supply of the city of Toronto, and the inhabitants thereof, with gas light and water, and it is evident that in relation to individuals supplied with gas light and water, as distinguished from the city, such transactions must be conducted by contracts between the company and the consumers, of frequent and repeated occurrence, and that all such contracts would be, in the prosecution and exercise of the very object for which the company was created.

Tested then by the rule laid down by Lord Denman, viz., necessity, or convenience amounting almost to necessity, and, as he suggests, not regarding the circumstances of particular cases, but looking at the governing principle, it seems to me clear, that to hold all contracts with private consumers of gas light and water, to be

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(*a*) In *Whitehead* v. *Buffalo and Lake Huron R. Co.* (7 Gr. Ch. 862), the Chancellor, in remarking upon the cases of *Mayor of Ludlow* v. *Charlton* (1840: 6 M. & W. 815) and *Arnold* v. *Mayor of York* (1842: 4 M. & G. 86), said, "although those cases do certainly militate against the principle laid down in *Church* v. *Imperial Gas Co.* (1839: 6 A. & E. 869), and seem in other respects objectionable, they have been distinguished, whether rightly or not I need not enquire, upon the ground that the actions in those cases were against municipal, not trading corporations, which are said to stand upon a different footing."

entered into under the common seal of the defendants, would be attended with the utmost inconvenience, and that such contracts may fairly be brought within the principle of inconvenience, amounting almost to necessity, so as to dispense with the seal; and if that be a correct view in relation to such business of the company generally—if such matters generally come within the governing principle, then I do not see any solid ground upon which the present case can be made an exception thereto.

It is not more special in its provisions than the case 6 Ad. & Ell. 846. Here the agreement is for one year certain—there it was a year, and from year to year, subject to be determined by three months's notice. There £12. 16s. a year was to be paid for the supply of gas for two lights, payable quarterly. Here the price for the year is £40., payable at the rate of £4 5s. a month from the 1st April to 1st December, and £1 10s. per month from the 1st December to 1st April; the supply (as stated in some of the counts) being limited to a quantity sufficient for 2,400 baths, and 4d. a puncheon for any excess.

There is certainly a difference in the price—restricting the supply, in this case, to a year only—and there it would appear the agreement had been partly executed on the part of the company, indeed by both parties. Here performance or payment on the plaintiff's part, &c., and acceptance on the defendants' part, up to the time of action brought, which is within the year, is averred, and of course admitted by the demurrer, and shews that the defendants have accepted, so far, the benefit of the agreement; and at all events by act in *pais* recognized and adopted it. There the company were plaintiffs—here they are defendants, but there as here, the declaration was on an executory contract, and I cannot satisfactorily distinguish the cases in principle or in circumstances. Then looking at the governing principle and contemplating the cases generally that would fall within it, I cannot perceive any substantial difference between this case and others of a like nature. The agreement is with an individual inhabitant. The quantity of water is to be regarded by data, which I must suppose, rendered it easily to be determined—the price and periods of payment are fixed. It is true that the supply is for the plaintiff's baths instead of ordinary domestic use, if that can make any difference; indeed it is the only particular in which it is peculiar, for in other respects such a contract might well be made with any inhabitant obtaining water from the defendants, viz: a certain price for a certain quantity, and a certain price for any excess, with fixed periods of payment. If private contracts for gas and water may in general be entered into without seal, so as to bind the parties

on the score of inconvenience or necessity, we must suppose that such business is conducted and carried on under some system of rules and regulations of the company, and if so, and if the contracts in genera made in conformity therewith are valid, without seal, I cannot say that any good reason occurs to me for making this exception.

What the practice or the extent of the business of the defendants are, I, of course, know not. Their business may be very limited or very extensive, and they may uniformly contract under seal, or otherwise. I am only speaking as to what I consider probable, from the nature of the business, and the constitution and system of management through directors, contained in the statute of incorporation; and the cases warrant me in relying upon the presumed multiplicity of the business and details, in determining the rule of inconvenience and necessity in expected cases. The insignificance or smallness of the matter is not the only test—inconvenience and necessity are likewise grounds for dispensing with the seal, such necessity being decided with reference to classes of transactions or business in general, and not only by the particular circumstances of any given case; at least so I understand Lord Denman.

I expressed my impressions on this subject, at some length in *Hamilton* v. *the Dock Company*, but perhaps went further in my remarks than the recent decisions fully warrant; I did not ground them exclusively upon the smallness, or insignificance, or mere inconvenience, or necessity of the case, but rested also upon what I must say has always appeared to me the most satisfactory and consistent view, which is suggested by *Murray* v. *E. I. Company*, 5 B. & A. 204; (see 5 Bing. N. S. 270; 13 Jurist, 65.)—that such a mode of dealing and contracting is (if not expressed) contemplated in the statute creating the corporation, from the very nature and purpose for which it was constituted. In such a distinction I can see some principle—I can see none in making it depend upon the mere value or amount, or frequency of repetition, or inconvenience, short of absolute necessity.

I cannot say that, as respects the defendants' operations, there is any absolute necessity for a dispensation with their seal in contracts with individuals for the supply of gas or water, neither was there any such necessity in the case in 6 A. & E. 846.

The court there seemed to have inferred the necessity from the multiplicity of such contracts, but such necessity cannot be absolute, or anything more than inconvenience; let it be an inconvenience amounting almost to necessity in that case; if so, a like inconvenience may be equally infered in the present case.

Considering, therefore, the object and purposes for which the defendants were created a body corporate, the multiciplicity and frequency of such transactions as agreements for supplies of gas and water, the exigency thereby created, amounting to great inconvenience, if not actual necessity, for relaxing the rule, and the close resemblance which this case bears to the contracts for like supplies that may be supposed to be ordinarily made by the defendants with their customers; I think the contract (though not under seal) binding, and the declaration therefore good.

Confined to the mere test of insignificance or necessity, the English authorities certainly warrant an opposite view: I have adopted that which seems to me the most reasonable and just deduction from the scope and spirit of the whole. Had the defendants denied the contracts, the onus of proving it would have been cast upon the plaintiff, and he would have been bound to establish it by legal evidence sufficient to go to the jury, and also sufficient to satisfy them of its legal existence, or he would fail on the trial. That the contract, not being to be performed within a year, should be evidence in writing under the statute of frauds, is of course, not at present a question.

McLean, J.—This action is brought for the recovery of damages from the defendants for not fulfilling a contract for the supply of water to the Toronto Baths, which are kept by the plaintiff.

The declaration contains four counts, in none of which does it appear that the agreement was in writing or under seal.

In order to maintain assumpsit it was not necessary to shew or set out a contract in writing, and that form of action could not have been adopted had the agreement been under seal. That it is not under seal, I think, must be assumed from the fact that no profert is made of it, and that the plaintiff has filed his declaration in assumpsit. To the first four counts of plaintiff's declaration the defendants have demurred, generally, and the grounds set out on the margin of the demurrer, and insisted on in the argument, are that the agreement in each of these counts mentioned, ought to be under seal, and it is not so shewn in these counts, and that the defendants being a corporation could not make the said agreement except under their corporate seal.

As to the question then, whether not being under seal, this contract is valid. It is admitted that corporations may enter into agreements, not under seal, for the purpose of carrying on the ordinary every-day transaction for which they may be formed, and that actions of assumpsit may be maintained by or against them on such agreements; but that

for all matters out of the ordinary course and routine of business, a contract must be entered into under the corporation seal. There are, as it appears to me, very good and substantial reasons why this should be so. In the ordinary dealings of such a company as the defendants with their customers in the supply of gas or water, their proceedings must necessarily be very much encumbered and embarrassed, if they were obliged in every case, no matter how trifling, to enter into a contract under their corporate seal, and therefore there is a necessity that in such cases they should be at liberty to contract otherwise than under seal; but in matters out of the course of ordinary dealing, such, for instance, as the erection of buildings, or putting up any machinery, there is good reason why a contract under seal should be required, in order to shew that the whole body of the corporation are assenting to it.

In this case the contract declared upon is for not furnishing a supply of water to the plaintiff's baths, and one of the objects of the corporation being to supply water to the inhabitants of the city, it cannot be denied that a contract for that purpose comes strictly within the ordinary business of the company, and as such, may be entered into without being under seal. But it is alleged that though in ordinary cases the defendants may make parol agreements for the supply of water, this agreement was, according to the plaintiff's shewing, so special in its provisions as to take it out of the general course of dealing, and to make it necessary that the contract should be under seal.

I confess I am unable to draw any distinction between this case and the cases which have been mentioned of *Beverly* v. *The Lincoln Gas Light and Coke Company*, 6 A. E. 829; and *Church* v. *The Imperial Gas Light and Coke Company*, 2 N. & P. 289—they involve, as it appears to me, precisely the same principle, and in the latter case Lord Denman, in delivering the opinion of the court, says: "on the face of this record we must understand this company to have been incorporated for the purpose of supplying individuals willing to contract with them for gas light and coke, and the present appears to be a contract for the supply of gas for a year, amounting to £12 16s., and so from year to year. We cannot be ignorant that such contracts must be of frequent and almost daily occurrence, and to hold that for every one of them, of the same or less amount, it was necessary to affix the common seal, would be so seriously to impede the corporation in fulfilling the very purpose for which it was created, that, we think, we are bound to hold the case fairly brought within the principles of the established exceptions;" and in a former part of that judgment he states what, in the judgment of the court, these exceptions were: he states the principle which ought

to govern to be "convenience amounting almost to necessity;" "wherever to hold the rule applicable (that a corporation must contract under its common seal,) would occasion very great inconvenience, or tend to defeat the very object for which the company was created, the exception has prevailed."

This language appears to me to be most applicable to this case. The defendants are incorporated expressly to supply water to all who may be willing to contract with them for it, within the City of Toronto—their agreements or contracts for that purpose must be of "frequent and almost daily occurrence," and varied only in the quantities which parties may require. The convenience of the company, "amounting almost to necessity," as Lord Denman observes in the case referred to, seems to take these contracts, therefore, out of the general rule into the exceptions.

If the defendants then can enter into any such contracts, in the ordinary course of their business, for supplying water, to what extent can they do so? To hold that they may make a contract not under seal which shall be binding upon them and all parties for the supply of a private dwelling, but that they cannot do so for supplying a large hotel or public building, would be to attempt to draw distinctions and to establish rules, which must depend upon the varying opinions of the courts, and would introduce a degree of uncertainty as to the validity of such contracts which could not fail to be extremely inconvenient and prejudicial.

In this case the plaintiff alleges, that he has paid to the defendants the consideration agreed upon, to be paid monthly, for supplying water for the use of the baths under his charge. If the defendants have failed in the performance of their contract, he is entitled to redress. Had *he* failed, the defendants under the authority of the case of *Church* v. *The Imperial Gas Light and Coke Company*, could have maintained an action against him on his agreement, and could have compelled him to pay the stipulated price. If the agreement then could be enforced by them, it seems to me to follow that it can be enforced against them.

SULLIVAN, J.—The objection taken in the argument, that this action was not sustainable until the expiration of the year, I think, must fail. It is absurd to say that all the water required for a bathing house during a year might be furnished on the last day. The defendants undertook to furnish the baths with water, as required, and as I understand the agreement set out, continuously, as it might be wanted.

Exceptions might have been raised to this declaration, which, probably, would prevent the plaintiff recovering upon it. It is only necessary to notice those that have been brought before us, except that I

may be permitted to say, that if the plaintiff should prevail upon this declaration, it by no means follows that it will be a safe precedent in a future case of the same nature.

As regards the main question raised on this demurrer—whether an action of assumpsit can be raised against this corporation in the contract declared upon—I fully agree with my brother Macaulay. I do not think it necessary to follow him in discussing the rules which prevailed in the earlier times, or in examining the old cases on this subject. The courts profess not to have altered the law as it formerly stood, but the increase of trading corporations, in late years, has manifestly created a tendency in the courts to extend to the utmost the relaxations from strict rule allowed by the old decisions, and to make use to the utmost of the arguments of necessity or convenience upon which these were founded.

It is admitted on all hands that the general rule is, that a corporation cannot contract unless under seal; this was relaxed for the ends of justice in favour of corporations, to enable them to recover on contracts when the considerations were executed against corporations of a certain character, because contracts not under seal, form a part of their necessary business; an early exception to the rule was in favour of contracts of a very ordinary and trifling character, and of very common recurrence —such as the employment of ordinary servants; these distinctions have given rise to much nice discussion, and to great difficulty of decision as the principle came to be applied to a new state of things; but now it seems to me that the law is clearly settled, and that this is not one of the cases in which any valuable distinction can be taken which would make it necessary to depart from the late decisions.

To begin with the case of *Beverly* v. *The Lincoln Gas Light and Coke Company*, 2 N. & P. 283—that was an action by a tradesman against the company for the price of six gas meters, ordered by the committee of the company, to be returned if found inadequate. The action was assumpsit for goods sold and delivered: the jury found that the meters were furnished and not returned within a reasonable time. And the court held, for the first time, that a corporation might be sued in assumpsit, on an executed parol contract. The case of *The Mayor of Stafford* v. *Tilt*, 4 C. P. 110, had decided in favour of the action of debt against a corporation for goods sold.

Then came the case of *Church* v. *The Imperial Gas Light and Coke Company*, 3 N. & Perry, 85. The corporation were plaintiffs in the court below, and the action, like the present one was executory. It was upon a contract to accept and pay for gas for one year, and so on,

from year to year, until three months' notice to stop. The breach was for non-acceptance, and non-payment; and Lord Denman, assuming it to be then established, that a corporation might sue or be sued in assumpsit upon executed contracts of a certain kind, amongst which are *included such as* relate to the supply of articles essential to the purposes for which it is created, gives it as the opinion of the court, that as regards this point, and in respect of such contracts there is no sound distinction between contracts executed and executory. "The same contract," his lordship says, "which is executory to-day may become executed to-morrow. If the breach of it in its latter state may be sued for, it can only be on the supposition that the party was competent to enter into it in its former state; and if the party were so competent, on what ground can it be said that the peculiar remedy which the law gives for the performance of such a contract may not be used for the purpose?" His lordship proceeds to shew that there is no tangible difference between a contract implied by law, upon an executed consideration, and one, the consideration of which is executory, and the contract express. The difference he says, is merely in the mode of proof. The court there decided in favour of the plaintiffs in the court below; and, in so doing, expressly overruled the case in the Common Pleas, *East London Water Works* v. *Bailey*, and decided the case before them on the ground that, on the face of the record, they must understand the company to have been incorporated for the purpose of supplying individuals willing to contract with them for gas-light and coke; and that they could not be ignorant that such contracts must be of frequent and almost daily recurrence.

The case of *The Mayor of Ludlow* v. *Charlton*, 6 M. & W. 822—The Court of Exchequer, to use the language of Baron Rolfe, subscribing to every word of Lord Denman's judgment, decided, in the case before them, against the competency of the Corporation of Ludlow to bind themselves by a contract not under seal for specific allowances for improvements in building in the town, on the express ground that the argument of convenience almost amounting to necessity did not apply.

The case of *Arnold* v. *The Mayor of Poole*, 4 M. & G. 444, was an action of debt for work and labour as an attorney, and was brought upon a number of bills of costs in different suits, in some of which the plaintiff was appointed attorney under seal, and in some not. The court, after reviewing and confirming the former decisions, besides against the legality of an appointment of an attorney not under seal, "for the appointment of an attorney to conduct important suits, affecting the rights and property of the corporation, cannot be considered a trifling matter, nor is it of such frequent recurrence, or of such immediate urgency, as

to render it inconvenient to postpone it till the seal of the corporation can be affixed to the retainer.—5 M. & G. 131.

Hall v. *The Mayor of Swansea*, 5 Q. B. 526—was an action of assumpsit for money had and received, brought by an officer of the corporation for tolls legally coming to him, but received and appropriated by the corporation; the action was sustained on the ground of *necessity*, and because of its analogy with the action of trover, the former authorities were recognised in this case, and the necessity was one rising from the nature of the transactions, which made the notion of a contract under seal, to return money wrongfully received, an absurdity.

The case of the *Queen* v. *The Mayor of Stamford*, was on the traverse of the return to a mandamus, for compensation for loss of office under the Municipal Corporation Act. The jury found an agreement to raise the salary of one office as compensation for the loss of another, and the actual receipt of the increased salary; but the agreement being traversed, the court held that it could not be recognised, not being under seal.

I see nothing in these cases to weaken the one of *Church* v. *The Imperial Gas Light Company*, a purely executory contract, not more in the way of the business of the company, than the present contract was in the way of the ordinary and daily business of the defendants. If the plaintiff had refused to accept and pay for the water according to contract, I think he would have been liable to the company; and I think the company liable to him for the breach of the contract on their part, if it be properly declared upon.

I cannot take any distinction, because this contract is for the supply of a bathing house, and one for an ordinary dwelling. The whole amount of the contract involves no sum or consequence of extraordinary importance; and to say that a contract for the supply of a bathing house or a manufactory, shall be subject to a different rule of law from a contract for the supply of a tavern, or boarding house or dwelling house, would in my opinion, be to establish dangerous and useless distinctions, which no one could tell where they would end, if once they had a beginning.

Mr. Justice DRAPER being in the Practice Court during the argument, gave no judgment.

Per Cur.—Judgment for the plaintiff on demurrer. (*a*)

ROBINSON, C. J., *dissentiente.*

(*a*) The case of *Whitehead* v. *Buffalo and Lake Huron Railway Company*, referred to in note *a*, page 185 *ante*, has been decided in the Court of Appeal. The decree of the Court of Chancery has been varied, by declaring the contractor entitled to be paid for the work by a *quantum meruit*.

GATES v. DEVENISH.

Statute labour—where to be performed—Conviction not set aside, a protection to magistrate.

A party, to save himself from fine, must perform—when called upon—his statute labor *within the division* of the township in which *he resides*.

A conviction made by a magistrate, so long as it has not been set aside, protects him against an action of trespass.

Special case.—This was an action of trespass against the defendant, who is a magistrate for the Home District, for seizing a cow of the plaintiff's. The declaration, which was filed in July last, was in the ordinary form. The defendant pleaded not guilty per statute. The cause was ready for trial at the last assizes for the Home District.

It was admitted that the plaintiff was an inhabitant of the township of Scarborough; he was called upon on the ninth day of July, 1847, within the time fixed by the statute, by the overseers of highways for the division of that township in which he resided, to perform the statute labor upon a certain highway in that division, according to the provisions of 1 Vic., ch. 21. He refused, and produced the following certificate of the two district councillors for the district:

"This is to certify that Jonathan Gates has agreed with the councillors of the township of Scarborough, that he shall have the privilege of doing his statute labor, together with his sons, on the road between lots 18 and 19.

"PETER SECOR, D. C.
"WILLIAM PATERSON, D. C.

"May 8th, 1847."

It was admitted that the road mentioned in this certificate was not in the division in which plaintiff resided, but in another division of the township, at a considerable distance therefrom, and that the plaintiff duly performed his statute labor on the road mentioned in the certificate; that Messrs. Secor and Paterson were at the date thereof the district councillors of Scarborough; and that the overseers of highways, in the division in which plaintiff resided, having made complaint before defendant, then being such magistrate as aforesaid, he, with a full knowledge of all the premises, issued his warrant, under the 22nd section of the above act, to levy the fine for six days' work and costs, which was accordingly done.

It was admitted that notice on the defendant was duly served, and that this action would be in this form, and the plaintiff be entitled to recover in case the above mentioned certificate was a sufficient excuse to the plaintiff.

It was admitted that no by-law or order of the District Council for the Home District had been passed, authorising the township councillors to give such a certificate, or in anywise altering the law touching statute labour from that established by 1 Vic., ch. 21, or any other enactment.

The following act of the Warden and Council of the Home District was passed 12th February, 1842, and was admitted to have been in force since then:

"Whereas, by a certain act of the legislature of the province of Canada, passed in the fourth and fifth year of the reign of her present majesty Queen Victoria, entitled 'An Act to provide for the better internal government of that part of this province which formerly constituted the province of Upper Canada, by the establishment of local or municipal authorities therein,' it is, among other things, enacted, that all and every the power and authority which by any act or acts in force within that part of this province which formerly constituted the province of Upper Canada, are now vested in the justices of the peace for the several districts, with regard to highways and bridges, or work connected therewith, shall, after the first day of January, 1842, become and be vested in and may be exercised by the district council for such districts respectively within the limits thereof. And whereas it is necessary for the due execution of the powers therein granted, and for the better protection and management of the local interests of her Majesty's subjects, that the power hitherto vested in and exercised by the justices of the peace acting within any division of this district, so far as the same has been vested in the district council, shall be exercised by the councillors within their several townships respectively: Be it enacted by the Warden and Councillors of the Home District, that from and after the passing of this act, that all and every the power and authority which, by any act or acts in force within that part of the province which formerly constituted the province of Upper Canada previously to the passing of the before recited act, was vested in the justices of the peace acting within any division of the district, so far as the same has been conferred upon the district council, shall be exercised by the councillors of this district, acting within the township or townships for which they may have been elected respectively."

The question for the opinion of the court was, whether the district councillors of a township have the power to authorize a party liable to perform statute labour in that township, to perform it in any other division than that in which he resides. And if the court should be of opinion that the said councillors have such power, that then a verdict

was to be entered for the plaintiff, with five pounds damages; but if the court should be of a contrary opinion, then a verdict was to be entered for the defendant.

Hagarty for the plaintiff. *Dr. Connor* for the defendant. The statutes referred to were—1 Vic. ch. 21, secs. 20, 29, 30, 50; 4 & 5 Vic., ch. 10, sec. 45; By-law of District Council, in February, 1842; 3 Vic., ch. 10; 59 Geo. III. ch. 8, sec. 27.

ROBINSON, C. J., delivered the judgment of the court.

The conviction, which is admitted to have been made by the defendant as a magistrate, protects him from this action, so long as it has not been set aside, and therefore we cannot give any other judgment than for the defendant. (*a*)

We can find nothing in any of the statutes referred to, or in the by-law laid before us, which would uphold the certificate granted by Messrs. Secor and Paterson; nor can we find anything in any statute which would at any time have upheld a certificate such as has been given here, if it had been granted by a justice of the peace. We are of opinion therefore, that the defendant is entitled to a verdict. (*b*)

Per Cur.—Postea to defendant.

THE QUEEN v. WISMER.

Dedication of a road by tenant—landlord's acquiescence.

A tenant for years cannot, by acquiescence or otherwise, dedicate a portion of the leasehold for a public highway, so as to bind the reversioner.

Semble: that where the reversion comes at once, without any interval of time to the tenant, his acquiescence in the dedication, while a tenant, will not bind him, in the absence of evidence of acquiescence in the dedication on the part of his landlord. Where therefore a tenant under the crown had been convicted upon an indictment for taking exclusive possession of the road, after he had obtained his patent.—The court refused to give judgment upon the conviction until evidence had been given to shew the crown a consenting party to the dedication.

The defendant in this case was tried upon an indictment for nuisance,

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(*a*) Where the same question has been once judicially raised between the parties and settled, and such judgment not set aside, it is *res judicata*, and conclusive. "It is for the public good that there should be an end of litigation; and if one point of law is better settled than another, it is that where a judgment is given it remains in full force until reversed." (Broom's Leg. Maxims, 298.) "A judgment reversed will be admissible as evidence not only between the same parties but likewise their privies, and also between those who, though not nominally, are really and substantially the parties. Such judgment will be evidence where the cause of action is the same, although the form of the second action be different from the first." (Broom's Leg. Maxims, 303.) *Place* v. *Potts*, 8 Ex. 710; 4 H. of L. 388.

(*b*) The Consolidated Municipal Act empowers Councils to regulate the manner and the divisions in which statute labour shall be performed.

in obstructing a highway in the township of Markham, and the jury found him guilty.

Both the prosecutor and the defendant, it seemed, desired to have the opinion of this court on the question whether the *locus in quo* was a legal highway, and with this view the indictment was brought hither by *certiorari*, no judgment having been given on the verdict.

The facts of the case fully appear in the judgment of the court.

A. Wilson for the crown. *Dr. Connor* for the defendant. The cases cited on the argument were—4 Camp. 16; 6 D. & R. 572; 5 Taunt. 12; 5 B. & Ald. 454; 1 M. & Gr. 392; 4 Tyr. 502; 1 Bing. N. C. 553; 5 C. & P. 460; 10 Bing. 78; 7 B. & C. 257; 11 E. R. 376, 419.

ROBINSON, C. J., delivered the judgment of the court.

It appeared on the evidence taken at the trial, as reported by the learned judge who presided, that in the original survey of the township of Markham, there was a public allowance for road between the defendant's lot 15, in the 7th concession, and the adjoining lot 16.

The road, which has in fact been opened as and for the public allowance, has been in use for 25 years and more. Statute labor has been performed on it by this defendant, as well as others, as upon the proper public highway. Of late, however, the defendant had objected that the road is not correctly laid out according to the intention of the original survey, but encroaches upon his land; and finding this to be the case, on having the side line of his lot run parallel with the township line at the end of that concession, he claimed a right, notwithstanding the long use of the highway in its present line, to have it confined to the proper public allowance; and in order to try the right, he extended his fence to the true northern limit of his lot, thereby shutting the public out of the greater part of the width of the old road, though not entirely closing it up.

Supposing, which we infer from the evidence in the case, that the deviation from the right line was not compelled by any necessity occasioned by the nature of the ground, and was not even intentional, but has been accidental arising from want of accuracy in laying out the road, then there would seem to be no good reason why the error should not be corrected, and the road laid out in its right place by the proper authorities.

That would be just towards the defendant, as it would give the proprietors on each side of the road their proper boundary, and the line of road would in itself be more direct and convenient.

Whether any attempt has been made to settle this dispute by such

an arrangement, we are not informed; but after some delay in bringing the matter before us, we are pressed to give judgment upon the conviction. And the first difficulty that presents itself is, that the jury appears to have given the verdict upon an imperfect knowledge of the facts of the case; for it would appear by the report of the trial, that it was assumed by the learned judge in giving the case to the jury (and there was nothing in the evidence to lead to any other impression), that during the 25 years that the *locus in quo* had been constantly used as a highway, with the assent of the defendant, he was himself seized of the land in fee. Now, however, it is brought out for the first time, as a new fact, that up to the year 1842, the fee of the *locus in quo* was in the crown.

This defendant, it appears, had a lease from the crown of the lot of which the *locus in quo* forms a part, being a clergy reserve, which lease, being for 21 years, expired some time before 1842; but having entered as leasee and enjoyed as lessee during the period the lease was running, he continued in possession till he purchased from the crown in 1842, when he received a grant of the fee under the great seal.

So we have here the defendant, while lessee for years of the crown, allowing the public freely to use the *locus in quo* as a highway for 25 years (that is, being such tenant for part of the time, and the rest of the time holding over), and then, in 1842, receiving a grant of the fee from the crown, soon after which he takes upon himself to assert an exclusive right, and shuts out the public. This places the case in a new light, different from that in which it was supposed to stand at the trial. Upon the evidence there given, I should say, there could be no question that the defendant was rightly convicted.

Now a new fact is stated, which was not proved at the trial, or if proved, not noticed or understood, though fully admitted before us at present, as well on the one side as the other. We cannot pass sentence on a conviction so obtained; for, undoubtedly, the general principle is, that a tenant for years cannot by any such act of dedication as is shewn here, bind the reversioner.

He could not affect the right of the crown, as regarded the reversion, by any dedication of that which was not his own. And it is now contended, on the part of the defendant, that it must follow as a consequence that he can claim under his grant the same right of exclusive possession as the crown had when the grant was made.

If it can be successfully maintained, on the other hand, that the defendant having while tenant acquiesced so long in the public use of the road, is bound by his acquiescence when the reversion comes to him

without any intermediate interval of time, though no other grantee of the reversion would have been; then, on that principle, the conviction might still be held to be proper. But we do not find authority sufficient to support that position, in the absence of evidence of acquiescence in the dedication on the part of the crown. And it is plain, that if the conviction could only be supported by establishing such acquiescence (and we think it could be no otherwise supported), then it will be necessary to satisfy a jury on that point, for it is not the province of the court to find the fact.

It will be necessary, therefore, that there should be another indictment preferred, if the obstruction still continues, in order that the case may be submitted to a jury on its proper grounds; unless the parties concerned should take the more reasonable course of having the road properly laid down and established in the true line.—See 13 E. R. 411.

Per Cur.—Conviction cannot be supported—
New trial ordered.

THE QUEEN V. RYAN.

Ineligibility of collectors of taxes under 1 *Vic. ch.* 21, *sec.* 18—*application for a quo warranto by a person evidently disqualified for the office.*

Under sec. 18 of the statute, 1 Vic. ch. 21—a collector of rates who has not paid over the amount collected by him, and settled his accounts with the treasurer on or before the third Monday in December of the year for which he has been serving—is ineligible to any township office.

The court refused an information in the nature of a *quo warranto*, with a view to place a party in the office of a township clerk, who, in making his application, shewed that he could not write.

Cameron, Q. C., obtained a rule *nisi* for a *quo warranto*, to determine by what right the defendant filled the office of township clerk of the township of Biddulph, in the district of Huron.

James Hodgins, the younger, made affidavit, that at the township meeting for Biddulph, on the 1st January, 1849, he was elected township clerk for that year; that Ryan opposed him, but that he was ineligible to any township office, not having made his returns to the treasurer of the district as collector of taxes for the township of Biddulph, for 1848, within the time prescribed by law; that there was a division and shew of hands at the election; and that a protest was entered and handed to the chairman of the meeting before any division or shew of hands took place, for that cause; and that notice was given to the electors previous to, and at the time of the division and shew of hands, that any votes given to Ryan would be thrown away on account of his ineligibility; that he, Hodgins, had entered into the bond required by 1 Vic., ch.

21, sec. 11, as township clerk, which had been transmitted to the treasurer of the district according to law; that he had demanded the township books and papers from Ryan, which came into his possession at the meeting, who refused to deliver them.

To this affidavit the deponent made his mark as a person who could not write. The protest is put in signed by nine persons.

James Hodgins, sen., swore that he was at the election, stated the delivery of the protest after the candidates were proposed, and before any division or shew of hands, (see 1 Vic., ch. 2 sec. 18,) that upon the division and shew of hands, Ryan was declared by the chairman to be elected, but that deponent, verily believed James Hodgins, jun., to be the duly elected clerk.

John and Adam Hodgins made affidavit, that on a division and shew of hands, Ryan had a majority; and that notice was given to the electors upon such division and shew of hands that the votes given for him would be thrown away on account of his ineligiblity, that they had respectively proposed and seconded James Hodgins, jun.; that upon the shew of hands, the chairman declared Ryan duly elected, in the face of the protest of the freeholders; and they swore that they verily believe James Hodgins, jun., to be the duly declared township clerk for 1849.

An affidavit of the treasurer was put in, that Ryan, as collector of Biddulph for 1848, did, on the 3rd of January, 1849, pay over all money collected by him in 1848, and relieved his bond as collector; and did not pay over and finally settle his account as such collector as aforesaid, with him as treasurer, on or before the third Tuesday in December, 1848.

ROBINSON, C. J., delivered the judgment of the court.

There is no doubt but that the statute 1 Vic., ch. 21, sec. 18, does render ineligible to any township office a collector of rates who has not paid over the amount collected by him, and settled his account with the treasurer, on or before the third Tuesday in December of the year for which he has been serving; and therefore it does appear that Ryan was ineligible when he was chosen, and ought not to have been returned in the face of the objection openly made. (*a*)

On the other hand (though that is not a matter that can have any retrospective effect in making that proper and legal now, which was illegal at the time it took place), yet it is shewn that almost immediately

(*a*) See, as to the general question of ineligibility to municipal office, the Consolidated Municipal Act, sec. 73, and the case of *The Queen* v. *Smith* (*treasurer*), and notes thereon, *ante* p. 101.

after the election, Ryan acquitted himself of his trust, and has obtained the treasurer's discharge. This does not alone weigh with us in declining to grant this application; but there is another rather strange circumstance in the case, which is the evident and utter incapacity of the party who desires to be placed in the office. He makes his mark to the affidavit filed in support of this application, from which, the only inference we can draw is, that he can neither write nor read; for it is very rare that a person can read, who cannot even write his name.

It would be using the discretion of this court unwisely to grant leave to file an information in the nature of *quo warranto*, with a view to place in the office of *township clerk* a person who cannot write, when his duties are all of that nature, which make such a qualification indispensable. Among other things, he is to record the proceedings at all township meetings. The court clearly hold in England that it has a discretion to withhold leave, and it would be answering no useful purpose to grant the present application. We did not observe the circumstance I have mentioned, or we should not have granted the rule *nisi*.

Per Cur.—Rule *nisi* for *quo warranto*, discharged.

LAI V. STALL.

Sales on Sunday—Statute 8 *Vic.*, 10, *sec.* 2.

Under the 2nd clause of the 8th Vic., 10, all *sales* of real and personal property *made on a Sunday*, are void.

Semble—That mortgages would not be void.

Trover for horses, waggon and harness.

Pleas:—1st. Not guilty.

2nd. Plaintiff not possessed of the goods.

The plaintiff owned the goods in question on the 15th of April, 1848, and on that day sold them as he alleged to one Wildt, but on the condition that they should be paid for by the 1st of September, 1848, and, if not, that the goods were then to be restored to the plaintiff. At the time of the transaction, Wildt was living with plaintiff on plaintiff's farm.

A sealed writing was put in and proved at the trial, according to which Wildt on that day (15th April, 1848), gave the goods in question to the plaintiff Lai, together with other things mentioned in an inventory, and also all the grain and stock upon the farm of Nicholas Lai (not specified in the inventory), valued in all at £78 15s. to hold the property, until such time as Wildt should pay to Lai the said £78 15s. "and upon payment, the goods (it was said in the agreement) shall be restored to Wildt by Lai."

Lai had also bargained with Wildt to sell him the land, and afterwards left the place and went to reside elsewhere—Wildt using the property in question on the farm as his own.

It was proved that Wildt represented himself to be in expectation of receiving money from Europe to pay for the farm and property, but was disappointed; and that, after living upon the farm till after harvest, and using the personal property mentioned in the writing as his own, he left the farm at midnight, taking the horses, waggon, &c., with him.

A mare, waggon and harness, which had been thus removed, was sold by Wildt to this defendant, from whom the plaintiff in October, 1848, demanded it; and, in consequence of the defendant's refusal to give it up, this action was brought. The mare, &c., was sold by an agent of Wildt, who gave him instructions to dispose of them; and only £15 was paid by the defendant on account of his purchase.

At the trial, the plaintiff founded his claim to recover upon the contents of the sealed writing, which stated the transaction as if the goods had been originally Wildt's, and mortgaged to the plaintiff for a debt, instead of resting his claim on his own original property in the goods, and on the fact that he had not sold them to Wildt, but only agreed to let him have them on the 1st of September in case they should be then paid for, and that in the mean time the property should remain in him, Lai.

It was proved that the written agreement was executed on a Sunday, and it was objected by the defendant that it was therefore void under the statute 8 Vic., ch. 45, sec. 2, being a contract for the sale of personal property on the Lord's day, made contrary to the statute. It was agreed that a nonsuit should be entered if this court should be of the opinion that the plaintiff's right depended wholly on the written instrument and that the instrument was void under the statute.

Verdict for the plaintiff, £35.

J. Duggan obtained a rule for nonsuit, on leave reserved. *Freeman*, of Hamilton, shewed cause. Cases and statutes cited on the argument —8 Vic., chap. 45; English Act, 29 Car. II. chap. 7; 1 Taunt. 131; Com. Dig. Temps. B. 8.

ROBINSON, C. J., delivered the judgment of the court.

We are all of opinion that the second clause of the statute 8 Vic., ch. 45, goes farther than the first clause, and does prohibit all sales of real and personal property on the Lord's day, and not merely such as may take place within the ordinary calling of the vendor.

The legislature could undoubtedly restrain, if they pleased, any trafficking whatever on the Lord's day, as an indecent violation of the

sanctity of the Sabbath; and the words of the act are so comprehensive and so plain that we cannot set limits to them.

The English statute 29 Car. II. ch. 7, is very different in its terms, and could not, consistently with plain grammatical construction, have been extended further than they have been in the cases which have been decided under the act.—1 Taunt. 131.—Com. Dig. Temps. B. 3.

If upon the whole evidence we could say that the transaction that took place in this case on a Sunday, was only a mortgage of personal property, then, perhaps, we could not hold it to be void under the statute, because that would not be literally a sale. So held 7 U. C. R., p. 535. It is sales only that are made void; and this being a penal act, we cannot extend it by construction to cases not within the letter, but it is at least plain that every *sale* or *agreement* for sale on the Lord's day, is prohibited; and, in order to give due effect to the act, which is passed for objects of public policy, we are not to be estopped by the writing from looking into the real truth of the transaction, and then we find by evidence that there was first a sale by Lai to Wildt on the Sunday of the property in question, which up to that time, Lai had owned, and this being void under the statute, the goods remained his as much as if no such transaction had taken place; so that the question is not merely whether the mortgage back to Lai, which was given on the same day, is void. This shews the verdict to be right as it is, and the rule is therefore discharged. The verdict is in other respects consistent with the real justice of the case.

Per Cur.—Rule absolute.

The Statute to prevent the profanation of the Lord's Day in Upper Canada, is Consolidated Statutes U. C. cap. 104, p. 943. Since this decision it has been expressly held that the giving or the taking in security is not void as a buying or selling within the meaning of the act (*Wildt* v. *Lai* 7 U. C. Q. B., 535.)

CHURCH QUI TAM V. RICHARDS.

Billiard Tables—Duty imposed on by Town of London, under Act of Incorporation —Provincial duty—Recovery of Penalty—in what form of action— Sufficiency of averments in declaration.

***Held per Cur.*—That a by-law of the corporation of London, passed under the authority of the statute 10 & 11 Vic., ch. 48, and providing "that every owner of a billiard table, shall pay £10 per annum for a license to keep the same," had not the effect of abrogating the duty imposed on billiard tables by the provincial act 50 Geo. III. ch. 6, but must be considered as a regulation superadded for the purposes of the town of London.**

***Held also*—That an action of debt would lie for the penalty, on the statute 50 Geo. III. ch. 6.**

***Held also*—That in an action for the penalty, it need not be averred that the defendant had not paid the penalty. *Also*—That it need not be averred in the declaration, that the defendant kept the table without having first obtained**

a license *from the inspector of licenses*—that he did so without having first obtained a license, is sufficient. *Also*—That it need not be averred that the offence was committed after the 29th September, 1810.

Semble—That the statutes 3 Vic., ch. 9, sec. 9, and 3 Vic., ch. 20, do not apply to any person merely setting up and keeping a billiard table for hire, not being at the same time a keeper of an inn or a house of public entertainment.

The plaintiff sued in debt for a penalty, under the statute 50 Geo. III. ch. 6; and declared, that the defendant heretofore, viz., on the 12th June, 1848, at, &c., had in his possession, custody and power a billiard table, set up and kept by him for hire and gain, without having first obtained a license to keep the same, against the form of the statute, &c., whereby and by force of the statute, &c., the defendant had forfeited for his said offence the sum of £100, and an action had accrued to the plaintiff, who sued as aforesaid, to demand from the defendant for himself and the Queen £100.

The defendant pleaded *nil debet* "by stat."

Verdict for plaintiff, £100.

Becher, of London, obtained a rule for a new trial for misdirection, the reception of improper evidence, and on the law and evidence. *J. Duggan* shewed cause. The authorities cited were—50 Geo. III. ch. 6, sec. 2; 3 Vic., ch. 9; 10 & 11 Vic., ch. 48, secs. 1, 26; Hob. 198; 2 Saund. 131; 6 Taunt. 140; 4 U. C. R., 365; 1 Saund. 309, note 5.

The several objections urged in banc will be found taken up one by one as they arose, in the following judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

The statute 50 Geo. III. ch. 6, imposes a charge or duty of £40 yearly upon every person having in his possession, custody or power any billiard table set up for hire or gain, and provides that it shall not be lawful for persons to have such in their possession without having first obtained a license for that purpose from the Inspector of the District; for which license he is to pay a duty of £40.

The statute then enacts that if any person shall, after the 29th Sept., 1810, have in his posession, custody or power any billiard table, set up for hire or gain, directly or indirectly, without having first obtained such license, such person shall forfeit and pay the sum of £100, to be recovered by action of debt, bill plaint, or information in his Majesty's Court of King's Bench in this province.

The duty imposed is appointed by the act to be paid to the Receiver-General of the province, and towards the support of the civil government thereof. And the statute directs that that one moiety of the forfeitures and penalties that may be incurred under its provisions, shall

be paid to the Receiver-General, for the use of his Majesty, "*and the other moiety to the person who shall sue for the same.*"

By the 3rd Vic., ch. 9, sec. 9, it is declared to be necessary to afford greater facilities for the conviction of persons having or keeping a billiard table without taking a license, and it is enacted, "that every keeper of an inn, alehouse, ordinary or recess, and every other person who shall keep a house of entertainment, resort or boarding, who shall have or keep a billiard table in such house, out-house or room or building connected with or attached thereto, and for the keeping or having of which billiard table a license shall not have been obtained, according to the provisions of 50 Geo. III., ch. 6, shall, upon complaint made by the inspector of the district, or any other person, to any justice of the peace, be liable to be convicted, upon such complaint, by two or more justices, *who may award execution thereon*, according to the provisions of the before recited act; any law to the contrary notwithstanding. And it is further provided, that, in case after conviction, the penalty cannot be recovered for want of property, either of the justices convicting may commit the offender to the gaol for one month, unless the fine and costs shall be sooner paid.

By statute 3 Vic., ch. 20, sec. 10, it is recited, that the payment of the duty imposed on billiard tables by the 50 Geo. III. had been evaded; and it is enacted, that every keeper of an inn or house of entertainment, who shall have and keep a billiard table in such house or building attached thereto, shall be subject as by the said act is directed.

By the statute 10 & 11 Vic., ch. 48, which forms the present charter of the Town of London, it is provided, in the 25th clause, among the other matters over which control is given to the mayor and town council, that they may pass by-laws for regulating or suppressing *all public billiard tables*; and further, that they may impose a duty on *all ball alleys, or other means of gambling within the said town.*

Under this general authority the town council of London made a by-law, 27th January, 1848, providing, that every owner or keeper of a billiard table should pay £10 per annum for a license to keep the same, and under this law a license was granted, on the 30th March, 1848, to one William Hatelie to keep and use the billiard table in question in his house in the court house square, for one year from 1st March, 1848.

It was contended at the trial, that this was all the license now required by law, for that the duty imposed by the corporation took the place of that imposed by 50 Geo. III., ch. 6; but it is clear, in our opinion, that the provincial duty still continues, and that this license, required by the corporation to be taken out under the by-law, is merely

a regulation superadded for the purposes of the town, which has not the effect of abrogating the other.

We consider also, that the action of debt for the penalty clearly lies on the statute 50 Geo. III., ch. 6, the act giving one half of the penalty to her Majesty, and the other half to the person *who shall sue for the the same*, and providing, in the third clause, that an action of debt may be brought for it.

The evidence shewed clearly that the offence was committed in the district of London; and the record shewed that the action was instituted in time.

As to the objection, that it is not averred that the defendant had not paid the penalty, the case of *Baldwin qui tam* v. *Henderson* in this court, (4 U. C. R., 365,) is in point against the defendant. And we think that the declaration, charging the offence as it does in the words of the statute, cannot be held to be insufficient after verdict.

It might have been more formal, to have averred that the defendant kept the table without having first obtained a license *from the inspector of licenses;* but the allegation, that the defendant kept the table without having first obtained a license contrary to the form of the statute, is sufficiently certain.

It is not a fatal exception, we think, that the declaration does not expressly state that the offence was committed after the 29th Sept., 1810. —1 Saund. 305, note 5. And we see no defect in the declaration, for which we should arrest the judgment. Although general in its mode of charging the offence, it follows the words of the statute, and has not been demurred to.

As to the competency of Hatelie to be a witness, we see no ground for questioning it. We have no right to assume that he has transgressed the law, and if he has, the recovery against this defendant cannot exempt him from answering for it.

But then we have to consider how the later provincial statutes which have been referred to affect this matter. I mean the 3 Vic., ch. 9, sec 9, and 3 Vic., ch. 20. It is rather strange that two such statutes should have passed in the same year; and they certainly are not carefully framed.

The provisions in those acts seem to be directed only against any keeper of an inn or house of public entertainment or resort, who shall have or keep in his house an unlicensed billiard table. They do not seem to apply to any person merely setting up and keeping the billiard table for hire, not being at the same time a keeper of an inn or house of public entertainment, and this seems, on the evidence, to have been the situation in which this defendant stood.

If the 3rd Vic., ch. 9, sec. 9, took in the case of this defendant, then the consequence would be, that he would be liable to be convicted in the same penalty of £100, (though the statute is ill drawn and obscure in that respect) by a much more summary mode of proceeding. Whether such provision for summary prosecution would be cumulative merely, or would be taken to supersede the proceeding by action in this court, given by the 50 Geo. III., ch. 6, would then be a question, which, however, we need not now consider.—2 Burr. 1040; 3 T. R., 442; 5 T. R., 542.

As to the argument, that the defendant did not mean to offend against the law, and that he supposed that the statute 50 Geo. III., was in force within the town of London, the defendant must be left to urge that in other quarters. We can only deal in this action with the legal questions, and we see no ground on which we can pronounce the verdict to be against law.

Per Cur.—Rule discharged. (*a*)

QUIN V. THE SCHOOL TRUSTEES.

Misjoinder of counts—Demurrer—Arrest of judgment—Liability of trustees to teacher, under School Act 9 Vic. ch. 20—Necessity of contracting specially with teacher under corporate seal.

Held per Cur., that the 1st special count in this declaration (given below) was in assumpsit, and the second in tort, and that there was therefore a misjoinder of counts.

A demurrer for a misjoinder of counts must go to the whole declaration; where therefore the defendant demurred to the 2nd count of a declaration, and the plaintiff demurred to the pleas to the 1st count—*Semble*, that upon the argument of the demurrers, the plaintiff could not object on exceptions taken to the 1st count of the declaration, that the *whole* declaration was bad for misjoinder of counts.

In an action of assumpsit brought by a teacher, against the school trustees appointed by the act 9 Vic., ch. 20, setting out a special agreement to retain the plaintiff in the employment of a teacher, for one year, from, &c., at a certain salary, &c., and also on a special action on the case, founded upon a parol agreement brought by the teacher, under the same statute, for wrongfully and without cause turning the plaintiff away, and preventing him thereby from earning his salary, it was *Held per Cur.*, that the declaration in both cases was bad, in not averring the agreement to have been made with the defendants by their corporate seal.

If the school trustees appointed under the act 9 Vic., ch. 20, decline to sign the order upon the superintendent for the payment of the teacher's money, as provided for by the act they may be proceeded against by mandamus, or per-

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(*a*) Every Council of a township, city, town or incorporated village, may pass by-laws for licensing, regulating and governing all persons, who for hire or gain, directly or indirectly, keep or have in their possession, or on their premises, any billiard table, or who keep or have a billiard table in a house or place of public entertainment or resort, whether such billiard table is used or not, and for fixing the sum to be paid for a license so to have or keep such billiard table and the time such license shall be in force. Consolidated Statutes U. C.; p. 587, ch. 84, sec. 261, sub-sec. 81.

haps they may be sued in a special action for not making the order, but they cannot be sued in an action *for the money*, as that is not in their hands.

Semble, that the school trustees have no power under the act to make an agreement for providing the teacher with board and lodging.

Declaration: 1st count.—"William Quin, by, &c., complains of the school trustees of section number four, in the township of Seymour, in the district of Newcastle. For that whereas heretofore, to wit, on the 8th day of January, 1847, the defendants, trustees under and by virtue of a certain statute of this province, passed in the ninth year of our sovereign lady Victoria, the now Queen, intituled, 'An Act for the better establishment and maintenance of common schools in Upper Canada,' were desirous of employing and securing to the school the services of a teacher of a common school, for the purpose of carrying on business of their said office.

"And whereas the plaintiff then was and from thence hitherto hath been and still is a duly qualified common school teacher, and then held and still holds a due and proper certificate to that effect, according to the form of the statute in that case made and provided.

"Thereupon, in consideration that the plaintiff, at the special instance and request of the defendants, and for and in consideration of the promises of the defendants hereinafter in this count mentioned, then agreed with the defendants to teach and conduct, for the defendants, for the space of one year, the common school in section number four, in the township of Seymour, in the district of Newcastle, according to the regulations provided for by the said act, passed in the ninth year of our sovereign lady Victoria, the now Queen, intituled, 'An Act for the better establishment and maintenance of common schools in Upper Canada,' they the defendants then employed, as such teacher as aforesaid, and then contracted with, bound themselves to and faithfully promised the plaintiff, among other things, that they would retain the plaintiff in their said employment for one whole year from that time—to wit, from the 8th of January, 1847—and pay and give to him the said plaintiff the sum of £30. and his board—meaning, &c.—and proper and reasonable and suitable meat, drink and lodging for the said plaintiff during said year; and the plaintiff saith, that he, confiding in the said promise of the defendants, hath always during said year kept and in all things faithfully observed the said contract and agreement with the defendants; of all which they had due notice.

"And the plaintiff further saith, that although the defendants did pay him a small sum, parcel of said sum of £30 to wit, £7 10s.—and did find and provide him with such board as aforesaid, for a short space of the said year—to wit, for the space of three months—yet the plain-

tiff saith that the defendants in fact wholly disregarded their said promise and undertaking so by them made as aforesaid, and did not nor would they pay or give to the plaintiff the residue of the said sum of £30.—to wit, the sum of £22 10s.—or any part thereef, or find or provide, afford or give him board as aforesaid, for the residue of the said space of one year—to wit, the space of nine months—or any part thereof, but wholly neglected and refused, and still do neglect and refuse, so to do, although there were, after their first refusal and before the commencement of this suit—to wit, on the 1st day of February, 1848—and frequently before and since, duly requested by the plaintiff so to do.

"And also that whereas heretofore—to wit, on the 8th of January, 1847—the defendants, trustees as aforesaid for the purpose of performing the duties of their said office, were desirous of employing a teacher for the teaching of a common school in said section No. 4, &c.: and whereas the plaintiff then was, and from hence hitherto hath been and still is a qualified common school teacher, and held a proper certificate to that effect, according to the form of the statute in that case made and provided: and whereas the defendants, trustees as aforesaid, had then chosen the plaintiff, then and during all the time aforesaid, to teach and conduct for them said school; thereupon—to wit, on the 8th of January, 1847—by a certain agreement then made and mutually entered into between the plaintiff and the defendants, it was agreed, among other things, that the plaintiff should, for the space of one year from the time of making said agreement, teach the school in section No. 4, in, &c., according to the regulations provided for by a certain statute of this province, passed in the ninth year of the reign of our sovereign lady Victoria, the now Queen, intituled, 'An Act for the better establishment and maintenance of Common Schools in Upper Canada;' and that the defendants should pay and give to the plaintiff, for his services as such teacher during said period of one year, the sum of £30. and find and provide the plaintiff such reasonable and proper meat, drink and lodging; and the said defendants then faithfully bound themselves and their successors, and promised the plaintiff that they would well and faithfully observe the said contract and agreement, and pay to the plaintiff the said sum of £30. in quarterly payments during the said year, and find and provide him with meat, drink and lodging, as aforesaid, during the said term. And the plaintiff saith, that he, confiding in the said promise and undertaking of the defendants, did—to wit, on the said 8th of January—commence to teach and conduct the said school in section No. 4, of, &c.; and from thence unto and until

the unjust dismissal and prevention of him from his said duties, and the faithful performance of his said duties, did in all things well and faithfully teach and conduct said school according to the regulations provided for by said act; that he did at all times during all the time aforesaid, teach diligently and faithfully all the branches required to be taught in said school, according to the terms of said agreement, and according to the provisions of said statute; that he did keep the daily, weekly and quarterly register of said school, and maintained proper order and discipline therein, according to the regulations and forms prepared by the Superintendent of Schools; that he had during all the time aforesaid, in said school, such public examinations of said school as required by law, of which he gave due notice to the parents and guardians of all children attending said school, and to all other parties and every person entitled to such notice by law; that he did at all times during the time aforesaid, when requested, act as secretary to the defendants; and the plaintiff further averred, that the defendants did retain and continue him in their employ as such teacher, and suffer and permit him to teach and conduct said school in said section for a short time—to wit, for the space of four months of said year—and that he so, during all the time aforesaid, having in all things faithfully taught and conducted said school, as aforesaid, was—to wit, on the 8th of April, 1847—ready and willing to teach and conduct said school for the residue of said year; of all which the defendants then had due notice. Nevertheless, the plaintiff saith, that the defendants, not regarding their said promise and undertaking so made as aforesaid, but contriving and wickedly and maliciously intending to injure the plaintiff, did, while the plaintiff was so faithfully teaching and conducting said school as aforesaid, and while they had such due notice as aforesaid of the plaintiff's readiness and willingness to teach and conduct said school for the residue of said year, and before the end and determination of the said year—to wit, on the day and year last aforesaid—wrongfully, &c., discharge the plaintiff from his said employ, and wholly prevent him from completing his agreement, and from teaching and conducting said school during the residue of the said year. By reason thereof the plaintiff lost and was deprived of divers great gains and profits, which he might have gained by teaching and conducting said school."

To the first count there were three pleas pleaded, to two of which the plaintiff demurred; but as judgment was afterwards given wholly upon the demurrer to the second count, and upon the legal exception (taken on the argument) to the first count, without referring in any way to these pleas, it is unnecessary to state them at length in the report.

To the first count, the defendants demurred on the following grounds:

First, That this action was against a corporation aggregate, and it was not stated in the said count that the defendants contracted with the plaintiff under their corporate seal.

Secondly, That the said second count and the averments were wholly unintelligible without reference to the first count, and no reference was therein made to the said first count in terms.

Thirdly, That there was no sufficient promise laid in the said second count.

Fourthly, That the action professed to be in assumpsit, and yet the said second count appeared to be in case.

Fifthly, That the matter contained in the said second count formed the subject for an action on the case, and not for an action of assumpsit against the defendant.

Sixthly, That the statute referred to in the said second count was not truly recited.

Seventhly, That the defendants in the said second count were charged in assumpsit for not paying the plaintiff his wages; and the defendants were not bound by the acts referred to, to pay the full amount of wages to the teacher, but only to pay a certain portion thereof after collection —their duties as to the other portion being to give orders on the District Superintendent for that purpose.

Eightly, That at any rate, the defendants were only bound to pay monies to the teacher after defraying the expenses of collection, and in such manner as directed by the majority of the trustees; that it was not averred in the said declaration that the expenses of collection were defrayed, or shewn when, where, or in what manner the majority of the trustees directed the money to be applied or paid; and that the plaintiff in said second count refers to a certain statute of "this province," not shewing what province he referred to, and the said statute applies only to Upper Canada.

The defendants also gave notice that they intended to rely on the argument of the demurrer in this cause, upon the following exceptions to the first count of the declaration:

First, That assumpsit was not maintainable against these defendants, on the cause of action stated in said first count, and that the action as to said first count should have been in debt or covenant.

Secondly, That the act of parliament referred to was wrongly recited.

Thirdly, That it was not averred in said first count that the defendants contracted under their common seal.

Fourthly, That for the cause of action stated in said first count, the

action should have been a special action upon the case, and not on the case upon premises; and the consideration stated was not sufficient to support the action.

Fifthly, That it was not averred specifically or with precision that the plaintiff performed his part of the contract, or was ready or willing so to do; and that he was not entitled to the residue of the said wages agreed to be paid, not having performed his work as agreed and shewn in said first count.

Sixthly, There was no mutuality of contract shewn.

Seventhly, The agreement was for more than a year, and not to be performed within a year; and it was not averred that it was in writing.

Eightly, That the whole declaration was bad for misjoinder of counts —the first count being in assumpsit, and the second in case.

Read for the demurrer.—He referred to the following authorities:— 9 Vic., ch. 20, sec. 13; *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815; *Arnold* v. *Mayor of Poole*, 4 M. & G. 860; *The Wardens of the City of London* v. *Robertson et al*, 5 M. & Gr. 131; *Smith* v. *Birmingham Gas Co.*, 1 A. & E. 326; *Blue* v. *Gas Co.*, *ante* 182; *The Queen* v. *Mayor of Stamford*, 6 Q. B. R. 433.

Hagarty contra.—He cited *Raines* v. *Credit Harbour Co.*, 1 U. C. R. 175; *Simpson* v. *Carr*, 5 U. C. R. 326.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plaintiff must fail in this case upon several grounds.

The first count is certainly in assumpsit; the second, I take to be in tort for wrongfully and without cause turning the plaintiff away, and thereby preventing him from earning his salary. There is no promise laid to employ him for a year. The promise laid in the second count is only to pay wages and to provide board, which does not necessarily imply an absolute promise to employ. In this respect, the case in this court of *Raines* v. *Credit Harbour Company*, 1 U. C. R. 175, is in point; and I refer to the cases cited in that judgment of *Aspden* v. *Anstin*, now reported in 5 Q. B. R. 573, and to *Dunn* v. *Sayles*, same book, p. 685.

There is also, in our opinion, good ground for saying that there is a misjoinder; and if so, judgment might be arrested for that cause, and it would therefore seem that it ought to be in the power of the court to give to the objection, although the demurrer here is not to the whole declaration, but only to one count, with demurrers to the pleas in answer to the other count.

As it is clear, however, that the demurrers do only bring in question

the several counts, with the pleadings thereon, severally, and not the whole declaration, and as a demurrer for misjoinder must be to the whole declaration, and as the rule that the court will not arrest judgment for any matter which might have been taken advantage of on demurrer would not seem to apply to this case, we are not satisfied that we should give judgment in favour of the defendant by reason of the misjoinder; and as there are other grounds on which the plaintiff must fail, it is better to avoid any doubtful ground. (*a*)

The first count is in our opinion bad, being in assumpsit upon an alleged agreement made by a corporation, not a trading corporation, and such an agreement as does not in our opinion fall within any of those excepted cases in which the use of their seal is dispensed with. We have so often had occasion to express our opinion on this point, that I consider it unnecessary to repeat the arguments here which have been stated in other cases. I would go to the full extent of English cases in dispensing with the seal, but we have no authority to go beyond them, and to disclaim being bound by the principle to any extent.

The case of *Raines* v. *Credit Harbour Company* would be no authority for sustaining this case against the exception I speak of, for that was a trading corporation, which this is not, and the judgment in that case was expressed to be given upon other grounds. (*b*)

Then, in addition to those objections to the first count, we think the action against the trustees is altogether misconceived. They are sued as if the money for paying teachers were in their hands, and were to be paid over by them to the teacher; but that is not so.

According to 9 Vic., ch. 20, secs. 8 and 13, it is the district superintendent who is to pay the money, not the trustees, so far at least as regards that part of it which is paid by the government. (*c*)

As to the portion raised by rate upon the inhabitants, that also, by the enactments of the law, goes into the hands of a treasurer, who is merely subject to their order. He may not have received the money, or may refuse to obey their order, and in neither case can they be liable to an action for not paying the money. They are public officers, who have only to discharge their proper duty. If they refused to make an order, a mandamus would lie against them, or perhaps a special action for not making the order, but not an action for the money, for that is

(*a*) Stra. 426; 6 Taunt. 630; 1 Ch. Pl. 701; 4 E. R. 502.
(*b*) 4 M & Gr. 860; 6 M. & W. 815.
(*c*) By the present statute, all moneys collected by the municipality, or received from Government, are paid into the hands of the municipal treasurers, and are paid out by cheques of the local superintendent, given to teachers on the orders of the trustees.

not in their hands. If the treasurer fails in his duty he is liable also to a remedy by action.

As to that part of the agreement laid, which relates to the board and lodging, the statute gives no authority to the corporate body to come under any such engagement. (*a*)

As to the second count, we must, I think, assume that the plaintiff is founding his action only on a parol assumpsit and not on an agreement under the corporate seal, and the same objection to the want of a sealed contract applies to this count as to the other. (*b*)

The second count is also bad, in our opinion, in averring that the defendants, not regarding their said *promise*, wrongfully and maliciously dismissed the plaintiff before the year was out, when no promise by the defendants to retain the plaintiff for a year in their employment is laid; and the defendants may, for all we know, have declined, properly and even necessarily, coming under any such engagement, though it might still be true that they had promised to pay the salary mentioned.

I do not see any other of the objections taken in the special demurrer which we could hold to be tenable.

For the reasons given, we think, the defendants are entitled to judgment on both demurrers, on account of the insufficiency of the declaration. It is not material therefore to consider the pleas.

Per Cur.—Judgment for the defendants on demurrer. (*c*)

HIGGINS v. HOGAN.

Right of ferry—Who must sue, grantee of crown or his lessee—if right be disturbed.

The crown grants a right of ferry to A., who leases, by writing, not under rent, to B. C. disturbs the right of ferry, and B. brings an action on the case against C. for such disturbance; but, *held, per Cur.*, that the plaintiff B. must be nonsuited, the right to sue being in A. the grantee of the franchise, and not in B. who, if he is interferred with, must look to A. and not to C.

Case for disturbance of a ferry.

The plaintiff declared that he was lawfully possessed of a certain ferry on and over the river Ottawa, from the township of Gloucester to

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(*a*) This is altered by the Common School Act 23 Vic. ch. 49, sec. 12, which provides that an agreement with a teacher (which to be valid must be under seal) may lawfully include any stipulation to provide the teacher with board and lodging.

(*b*) In accordance with this decision, the section of the act above referred to provides that "all agreements between trustees and teachers, to be valid and binding, shall be (1) in *writing*, (2) *signed* by the parties thereto, and (3) *sealed* with the corporate seal."

(*c*) See also the cases of *Anderson* v. *Vansittart*, *ante* p. 145, and *Sheriff* v. *Paterson*, *Ib.* p. 147.

Gatineau Point; and that the defendant, knowing the same, and wrongfully intending to injure the plaintiff in the peaceable enjoyment of the said ferry, carried passengers and goods for hire over and within the said ferry of the said plaintiff; whereby the plaintiff had been disturbed and disquieted in his right and title to the said ferry.

Pleas.—1st, Not guilty.

2nd, That the plaintiff was not, at the said times when, &c., or either of them, possessed of the said ferry in manner and form, &c.

3rd, Leave and license of the plaintiff.

At the trial it was proved that the crown leased the ferry by letters patent, on the 23rd April, 1846, to Mrs. Charlotte McNab, for seven years; and the plaintiff produced a letter to him from Mrs. McNab, dated the 24th March, 1849, in which she says, in answer to a proposition which it appears the plaintiff had made to her, "I hereby agree and do lease to you the ferry and cottage above described, at the rate above stated (which was £20 a year), for one year exclusively; for which I acknowledge the receipt of a joint note from yourself and others, dated 21st instant, for £20. payable in quarterly instalments; and I will be happy to grant you a lease for a further term of years, should we agree upon the security; your note, you are aware, only covers one year."

This was signed by Mrs. McNab, but it was not under seal—it was a mere letter.

The defendant's counsel moved for a nonsuit at the trial, on the ground that the plaintiff shewed no legal interest in the ferry, such as could entitle him to bring this action.

The learned judge overruled the exception, and a verdict was given for plaintiff—£2.; reserving leave to the defendants to move this court for a nonsuit.

Eccles obtained a rule for a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for a misdirection. He cited 2 B. & Ad. 336; 6 B. & C. 103; 4 Nev. & Perry, 502; 2 A. & E. 696; 6 A. & E. 824.

Vankoughnet shewed cause. He cited 7 Scott, N. R. 709.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt that the rule for nonsuit must be made absolute on the ground which was taken at the trial.

A ferry is a franchise which cannot be set up without the king's grant, and the grant in this case was not to this plaintiff.

It may be that the lessee of the crown could, under the statute 11 Geo. II., maintain an action for use and occupation against this plain-

tiff, though the ferry is an incorporated hereditament, and though there was no demise by deed; that it would be a totally different question.

It is true that the owner of a franchise like this cannot bring an action for disturbance, unless he is in possession; but it would not follow that any person in possession, whether by title or not, could bring such an action. Neither is it to be assumed that the owner of the franchise is not to be regarded as being in possession, for the purpose of this action, because he has a tenant holding under him.

The case of *Peter* v. *Kendall* (*a*) has the most direct bearing on this question; but as the person who had there taken the ferry, as this plaintiff did, not by deed, was held to have surrendered his interest, it became necessary to determine the point whether, if he had been disturbed while he was holding as tenant under a parol demise, he could have maintained an action for the disturbance. In the course of the argument, Mr. Justice Bayley remarked: "This being an incorporated hereditament, would not the demise be void, not being by deed?" Of course it would be void; and I do not see how a person holding only under such an invalid title could maintain an action for interference with his right; for this is not like an action of trespass, which may be maintained against a wrong-doer upon a peaceable possession merely, whether rightful or not. In this action we must see that a right has been infringed.

It is true that the plaintiff can declare upon his possession alone, and usually does so; but that is not decisive of the question before us; it only shews that the possession of the ferry is *prima facie* taken to be a rightful possession. But in this case the true state of facts appears, and, as we take it, Mrs. McNab is shewn to be the person entitled to sue for disturbance, and not this plaintiff, who must look to her if he is interferred with.

Per Cur.—Rule absolute for nonsuit.

WHITING v. MILLS.

Innkeeper and traveller—when it can be said the relation ceases to exist—as to averment in declaration of the existence of such relation at the time of turning away the traveller from the inn, after verdict.

Where a traveller is shewn to have come to an inn as a guest—to have been so received by the landlord—to have staid there six weeks, and to have paid for his board by the week, two days in advance: Held *per Cur.*, that if dismissed abruptly without cause, he has, under these circumstances, a right of action against his landlord, on the common law relation of innkeeper and guest. To put an end to this relation, the traveller must be shewn to have rented a certain apartment in the inn as tenant for a certain term.

(*a*) 6 B. & C. 703.

Where the declaration avers that the plaintiff came as a guest and was so received—the intendment after verdict will be that the relation thus begun *continued* till it was interrupted by the wrongful act of the defendant, nothing being stated to the contrary.

The plaintiff sued the defendant in a special action on the case: the declaration contained two counts.

The first count charged that the defendant was an innkeeper and kept a common inn at Kingston for the reception and accommodation of travellers; that on the 24th February, 1848, the plaintiff, being a traveller, came with certain goods and chattels, &c., and was then accepted and received by the defendant into the said inn with the said goods, as a guest, and that the plaintiff afterwards, to wit, on the 1st April, in the year aforesaid paid to the defendant a large sum of money, viz., £10. being for board in the same inn for the space of six weeks ending on the 3rd day of April aforesaid. Yet that defendant, not regarding his duty, as such innkeeper, but contriving to injure the plaintiff, and to put her to great and unnecessary trouble, and expense and inconvenience, and to injure her health and feelings, afterwards and upon the said third day of April, did not nor would suffer or permit the plaintiff longer to continue or lodge at the said inn, as aforesaid, with the said goods, during the said time in that behalf, but wholly neglected and refused so to do; and on the contrary thereof, on the night of the said first day of April, in the year aforesaid, then wrongfully and unjustly turned the plaintiff, with the said goods, out of his said inn, whereby the plaintiff was forced to quit the said inn, and to go and travel in the night time of the said 1st April, to the distance of ten miles, in order to procure lodging elsewhere, and a place of safety for her goods.

The defendant pleaded—1. Not guilty. 2. To the first count—That the plaintiff was not as a traveller received in the defendant's inn as a guest, as in the first count alleged.

3. To the first count—That the plaintiff did not as such traveller as aforesaid pay to the defendant the said sum of money in the said first count mentioned, or any part thereof, as in the said first count alleged; and of this he puts himself upon the country.

On the second count a verdict was given for the defendant; it was therefore out of the question. The jury found for the plaintiff on the first count, and 25s. damages; but upon the 3rd plea to that count they found for the defendant.

The plaintiff, by *Henderson*, obtained a rule for judgment *non obstante veredicto* upon the third issue, contending that the plea was no defence—or in the alternative, for a new trial on the ground of misdirection in regard to that issue.

A cross rule was obtained also by *McKenzie* for the defendant, to shew cause why a new trial should not be granted on the law and evidence, or why the judgment should not be arrested on the ground that it was not averred in the first count that the plaintiff was in the inn in the character of a guest at the time of her being turned away; but only that when she came she was received and accepted as such. The authorities cited were—3 B. & Ald. 283; 7 C. & P. 213; 8 M. & W. 372; 11 M. & W. 239; 6 Bing. N. C. 446; 2 M. & W. 495; 8 M. & W. 268; Salk. 338; 12 Mod. 255; 5 T. R. 273; 17 L. J.; C. P. 219; 1 Saund. 312 (*c*); Poph. 279.

ROBINSON, C. J., delivered the judgment of the court.

In a case where the jury have given such small damages, it would be unfortunate if a necessity were forced for continuing a litigation which is not likely to be of service to either party.

1st. As to the defendant's application for a new trial in case the 3rd issue on which he succeeded, should not be held to be a good bar to plaintiff's action—we see no sufficient ground on which we could grant it. It was proved that the plaintiff came to his inn as a traveller or guest, and was received as such. If she did pay by the week as was alleged, and if she was charged for board by that name, that would not certainly show that she was there under any special contract inconsistent with the common law relation between an innkeeper and his guest. She had been there about six weeks. If she had rented a certain apartment for any certain term, she would have been no longer a guest; but what is shewn is that she came to the inn as a guest; that she was so received, staid there six weeks, and had paid her board by the week two days in advance.

Under these facts, we think the defendant, for all that appears, had his privilege of lien on the plaintiff's goods, if she had attempted to depart without paying; and that she, on the other hand, had her rights as a guest, and could not be rudely or abruptly turned out without some cause to justify it; and no such cause was shewn, nor was any pleaded.

If the relation of guest had, before the occasion complained of, been put an end to, we can only say that it was not proved to be so upon the trial.

Then, 2ndly, as to arresting judgment; the declaration seems to have been taken from a form in the case of *Fell* v. *Knight*, 8 M. & W. 269. It states that the plaintiff came as a guest, and was so received; and the fair intendment, after verdict is, that the relation thus established, continued until it was interrupted by the alleged wrongful act of the defendant, nothing being stated to the contrary. The mere paying

two days in advance would not make her anything but a guest; she might have good reason for doing so, or might have assented, merely because she was so charged. The landlord may, for all we know, have usually charged his guests by the week, when they staid over a week. Then, as it is averred in the declaration that the plaintiff was received as a guest and paid her bill, and was nevertheless turned away against her will, without anything being stated in the declaration from which we can see that she had not continued in the defendant's inn as a guest up to that day, and as the act is charged to have been contrary to the defendant's duty as an innkeeper, we think a good *prima facie* case is stated on the record, and, as I have already stated, no justification for turning the plaintiff away was proved or pleaded.

Then, 3rdly, as to plaintiff's motion for judgment *non obstante veredicto*, upon the third issue: We think we must look upon the third plea as admitting what is not directly traversed in it—namely, that the plaintiff was in the defendant's inn as a guest, and as being intended to deny only the allegation of payment of her fare, which was a fact necessary to be proved in order to sustain the plaintiff's case, and a fact expressly averred in the declaration. The plaintiff rested her case, not on any allegation of tender, but on an averment of actual payment. The 3rd plea traversed the payment and did not the less traverse it because it added that she did "*not as such traveller pay*," &c. If a party sued as executor were to plead payment, and the plaintiff were to reply, that he did not as such executor pay, we should treat that, not as a traverse of the executor's tender, but of the payment. So we think that the said plea traversed a material fact, and it has been found for defendant. We think that such finding was not in accordance with the evidence; but the matter in dispute is trifling, and it is stated, and also the fact is so, that in the argument of the rule the plaintiff's counsel declared that he abandoned any application for a new trial, on that issue upon the evidence.

The rule therefore for judgment *non obstante* is discharged.

BEFORD V. HAYNES.

What constitutes a dedication of land to the public.

A dedication of land to the public use takes effect from the *intention* of the person making it; and the merely opening or widening a street for the convenience or benefit of the person doing it, and permitting the public to use it, will not constitute a dedication. The question of dedication or no dedication must now be left as a question of fact for the jury.

Action on the case for obstructing "a certain public highway in, through, over and along a certain close situate and being in the town

of St. Catharines, in the District of Niagara, commonly called Ontario Street, by erecting and placing a wooden building on the said highway, whereby plaintiff was prevented from passing along the same with his team," &c.

Plea—that the wooden building mentioned in the declaration was not, nor was any part thereof, at the said time when, &c., upon the said public highway, or obstructing the same, in manner and form, &c.

The case was tried before the Chief Justice at the last assizes at Niagara. It appeared to be conducted as an amicable suit brought to try whether the defendant had or had not acted wrongfully in placing his house where he did, and no objection was taken or question raised as to the right of the plaintiff to bring a private action for what would be a public wrong, and properly punishable only by indictment at the instance of the crown,—unless the plaintiff could shew, what he did not appear to the Chief Justice to do, that he had sustained any special and particular injury from the nuisance.

The parties went at once and without reserve into the question of legal right in the defendant, and after hearing the evidence, the jury found a verdict for the defendant upon the recommendation of the court, subject to leave reserved to move to enter a verdict for the plaintiff, if the court should be of opinion that he was entitled to recover.

The point to be determined may be made sufficiently clear by a short statement. The defendant, and those whose title he holds, have been in possession for more than forty years of some acres of land in the township of Grantham, which now form a part of the town of St. Catharines. The tract composes part of one of the farm lots in Grantham, having its front to the south, on the public road leading from Niagara to Hamilton. Along the west side of the lot there is a highway leading from Lake Ontario to St. Catharines, which intersects the Hamilton road at right angles at the south-west corner of the defendant's tract. About forty years ago, the only house upon this tract was Shipman's Tavern, a wooden house which has been occupied as an inn ever since. This house was originally placed some yards back from the Hamilton road, and was built with its front not ranging parallel with that road, but having its right or western end thrown back, so as to make the building front towards the south-west corner of the tract, and leaving a vacant space not only in front of the house and between it and the Hamilton road, but around the end of the house which looked towards the lake road. This space has been always allowed to be unenclosed, the proprietor nevertheless having the south-west angle of his tract, about which there was no dispute, always distinctly marked by a

monument. For many years, from 1808 downwards, the house was a mere country inn, but now the tract forms nearly the circle of the town of St. Catharines. The line of road betwixt Niagara and Hamilton, where it passes along the front of the road, is now called St. Paul's Street; the road running down to the lake is called Ontario Street. The space which Shipman left unenclosed along the front and about the west end of his house, has always laid open to the public, like other such vacant spaces contiguous to the highway, where the proprietors have chosen to build a little back from the boundary; and from an early period, as would usually take place under such circumstances, people passing with their waggons backwards and forwards between the Niagara road and the lake road, instead of continuing along either road till they came to the point of intersection at Shipman's corner, would shorten the distance by turning out of the road they were travelling before they came to that point, and crossing the open space close around the west end of the inn; but there was still the regular line of road open and in use, which would generally be taken by those who were neither intending to stop at the inn or go to any point east of it.

St. Paul Street is now the principal street of St. Catharines, and the Board of Police having made regulations prohibiting the putting up any more wooden houses upon it, the defendant, who now owns that tract in question, in May, 1849, wrote to the Board, stating that he wished to move round and straighten the old Shipman's tavern so as to place it on the line, and to improve the external appearance of the building; and he begged to ask whether the board had any objections to his doing so. No objection was made, and the defendant moved the house round so as to make the front range with the other houses on St. Paul Street; and by thus laying the west end at right angles to that street, the building was made to cover a small space of ground which had before for a great many years been travelled over by the public in taking the short cut which it was usual to take around the corner of the inn; he added also a small piece to the west end of the house.

The corporation complained that the defendant had, by encroaching upon these few feet of land with his building, done more than they had given him permission to do; they contended that by asking their consent he had admitted that he had not a right to encroach upon any part of the land which had so long been left open to the public; and they intended that the use which had so long been allowed to be made of the open space amounted to a dedication of it as a highway; and they gave some proof that statute labor, or the funds of the corporation, had occasionally been applied of late years in mending and reparing, as part

of the highway, the same small piece of land which the defendant had lately covered with his building.

The defendant on his part denied that any dedication of the vacant land as a highway was to be implied from the facts of the case. He gave evidence to disprove the alleged fact of public labor or money having been applied in repairing the piece of land now in question as a highway, and he alleged that his application to the corporation had referred to their own order that none but brick or stone buildings should be put up in St. Paul Street, and that he was in doubt whether his giving a new wooden front to the old building in the manner he proposed, would be deemed an infraction of the by-law.

Cameron, Q. C., obtained a rule to shew cause why a verdict should not be returned for the plaintiff. *Vankoughnet*, with whom was *Wm. Eccles*, shewed cause. The authorities cited were—11 M. & W. 828; 5 C. & P. 460; note to 1 Smith's L. C. 193; 5 B. & Al. 454; 11 Ea. R. 375 note; 5 Taunt. 142; 1 Campb. 263; 4 B. & Al. 447; 1 Mg. & Gr. 392; 8 A. & E. 106, 847; 3 Bing. 447; 4 B. & C. 491; 17 L. J. Q. B. 177.

ROBINSON, C. J., delivered the judgment of the court.

The case was tried before me. I did not think much of the alleged small repairs done to the road in that part which the building now covered, because the evidence was contradictory on that point, and it was something inconsiderable at all events, and could not be conclusive as to the right, since for convenience or ornament the authorities of a town might choose to apply a little labor or money on a piece of land situated as it was, so long as the proprietor choose to let it remain open without their imagining that they could thereby deprive him of his property; and the owner could not be expected to object, since it would not interfere with his convenience.

Then, as to the acknowledgment of right endeavoured to be drawn from the permission which the defendant had applied for; that again could not be a conclusive circumstance, especially explained as it was; and whether that explanation was satisfactory or not, still, if the defendant had a doubt as to his right to occupy the few feet of ground which had been so long left open to the public, it was natural and commendable that he should first communicate with the council rather than act rudely on his own impression of his rights. At any rate, he could not absolutely lose his right by asking whether the corporation would make any objection; and after all, the issue which the jury were to try upon their oaths, was whether the *locus in quo* was or was not, at the time of the alleged obstruction, part of a public highway. That was the ques-

tion to be tried, and I left it to the jury upon the evidence to say, whether the defendant and those under whom he claimed had allowed people to use the land in question, intending to dedicate it to the public as a highway,—or whether they had merely for their own taste or convenience, or the convenience of those who resorted to the inn, left open and unenclosed the space around the house, contiguous to the highway, and within the acknowledged boundaries of their property.

The jury found that it was not with the intention of dedicating the land to the public as a highway that it had been allowed to be open, but that the land being contiguous to the highway, the proprietors had merely forborne to enclose it for the convenience of themselves and of those who resorted to their inn.

We think that it was proper so to submit the case to the jury, and that the verdict was not inconsistent with the facts proved, and should therefore be allowed to stand.

The proprietor in this case had laid out no road to lead through his property from one public thoroughfare to another, which was before unconnected by any travelled highway. All that could be said was that Mr. Shipman, coming to the place at a time when little was thought of a few yards of ground, had built his house, as it way very usual, some distance back from the road, and had not thought it worth his while to enclose the vacant space, finding it no doubt more for his convenience to leave it an open space in front and about his door. There was already a highway on both sides of him; a road was not wanted in order to enable the public to pass from one point to another; and there is no reasonable foundation in such a case for presuming an intention to dedicate the ground as a highway, because the public had already a highway there to which this open space was contiguous. It is difficult to lay down any rule that should be inflexibly applied in such cases; and it would be unsafe and embarrassing to attempt it. Each case must depend on its own circumstances; and it must commonly be a question for the jury with what intention the user has been permitted. It would never do to hold it for a general rule, that where the owner of land lets a space lie open between his house and the highway for a number of years, he must be taken to have intended to add that to the highway which has an ample width already secured to it by statute—making the road, without necessity, or without any rational object of convenience to the public generally, so much wider in that point than it is in others.

A man is under no legal necessity to enclose all his land; the law encloses it with an invisible boundary; and while he resides upon any part of it, he is at the same time equally in possession of the whole—it

not being necessary to the continuance of his right of property that he should exclude the public from space which he leaves open for his own convenience; and this the public will always more or less take advantage of in order to move about more freely, where it lies contiguous to the highway, and where they can save a few yards travelling by cutting across a corner of his open ground, rather than following the regular public highway to the proper point for turning. They will generally take the liberty of doing so, but it would be unreasonable to hold that this kind of liberty, under ordinary circumstances, after any lapse of time, turns into a right, so that the proprietor can never resume possession of his property and leave the public to enjoy the legal highway according to its proper limits. In the case of lots in a town left for some years unenclosed, such a doctrine would create great hardships. Nothing is more common than for persons, especially in the country, to build at a small distance from the road, leaving the retiring space open. So, in many parts of the province where proprietors have their lands extending down to the lake or river, it is not uncommon for them to build on the further side of a road leading along the bank, leaving their land vacant between the highway and the bank where the area is small. In all such cases, travellers, so long as the ground lies open, may divide if they please from the common track, and go over any point of the vacant space; but I never observed that the right of the party to enclose his land, after any lapse of time, has been questioned, so long as he leaves to the public allowance for road its full width.

What is contended for by the plaintiff in this case, would, if it were conceded, impose upon all persons the necessity of building on the very limit of their lands; for otherwise, however desirable it might become for them afterwards to occupy all that they owned, they would have lost their right to do so; and when a proprietor's lands bordered on the highway, it would not be safe for him to make any temporary sacrifice for comfort, or convenience, or for ornament. If he should leave it open where it lay immediately adjacent to the highway, the public would be sure to take the liberty of passing over it whether he liked it or not, and more especially if it afforded the means of a short cut around a corner, as in the present case. The proprietor therefore, when his land is so situate, in order to save his property, would be compelled to enclose it up to the house, although by thus shutting out the public from excess to his house he might subject himself to great present inconvenience.

The spirit of the English decisions is in favor of the view which we take of this point; and it is in accordance with them that it has been

held expressly in several cases in the American courts, that "a dedication to a public use takes effect from the intention of the person making it, and that the merely opening or widening a street for the convenience or benefit of the person doing it, and permitting the public to use, will not constitute a dedication."

This is stated in a note to the case of *Poole* v. *Huskisson*, in the American edition of Meeson & Welsby's Reports, vol. II., 828; which case itself fully supports the principle, that under such circumstances as I have stated, the question of dedication or no dedication is now to be left to the jury.

We must be understood, however, as not sanctioning by our own judgment any further change of the plaintiff's possession than has actually been made, and which formed the foundation of the question in this cause; for the evidence would have to be carefully considered in regard to its application and effect upon any particular portion of the land, taken in connection with what has been done by public authority respecting the several streets, and the manner and spirit in which that has been submitted to.

Per Cur.—Rule discharged. (*a*)

BROCK DISTRICT COUNCIL V. BOWEN ET AL.

Bond—variance in setting it out—The effect of not setting out the condition of a bond, but treating it merely as a common money bond on a plea of non est factum—The effect of taking a verdict for the penalty, and not suggesting breaches on the record, where the bond comes within the statute.

The plaintiffs, by the name of the "Council of the District of Brock," declared in debt on bond. The declaration stated that the defendants acknowledged themselves to be held and firmly bound *to the said plaintiffs*; the bond, when produced at the trial, was found to be given "to the *Municipal* Council of the Brock District" The bond was not set out on oyer. *Held per Cur.*, that this variance was not fatal.

The plaintiffs—who had taken from the defendant a bond for the due performance of a collector of rates' duty, *with a condition* in the form prescribed by certain municipal by-laws—declared upon this bond as upon a common money bond, without setting out the condition. The defendants pleaded *non est factum*. *Held, per Cur.*, that upon this plea, the condition being only a defeazance and not part of the bond, the bond, as set out without the condition, was a valid bond; that there was no fatal variance, and that the plaintiffs were entitled to recover. It would have been better however for the plaintiffs to have set out the condition in their declaration, and to have assigned breaches.

In debt on bond—to take a verdict for the penalty, where breaches have not been suggested or assigned in the replication, and the bond comes clearly under the statute 8 & 9 Wm. III. is irregular, and the verdict may be set aside.

Semble—that the breaches may be suggested even after verdict, and then the plaintiff may go down again before a jury and assess his damages.

(Q. B., H. T., 13 Vic.)

The plaintiffs, by the name of the "Council of the District of Brock,"

(*a*) The law relating to line fences and divisions between lots, will be found in the Consolidated Statutes for Upper Canada, cap. 57, p. 689.

brought this action against the three defendants, on a bond dated 30th October, 1848, in the penalty of £300. The declaration stated that they acknowledged themselves to be held and firmly bound *to the said plaintiffs*. The condition was not set out.

The defendants pleaded—

1. *Non est factum.*

3. That the bond was made by Bowen as collector of rates for the township of Burford in the District of Brock, and by the other defendants as sureties, under the provisions of an act of the parliament of Upper Canada, passed in the second year of Queen Victoria, entitled "An Act to alter and amend sundry acts regulating the appointments and duties of township officers;" and that it was not in the form or such as was required by that statute, there being no condition as prescribed by the statute.

3. That the bond was made by the defendants for the purpose stated in the last plea, and that on the 3rd January, 1849, the treasurer of the district laid before the quarter sessions, according to law, a list of collectors' rates in arrear for the year 1848, and returned Bowen as being in arrear for that year, and that a warrant was thereupon issued to the sheriff to distrain, and the sheriff did distrain the goods and chattels of the defendants to the full amount of the rates in arrear, with costs.

4. That the bond was obtained by fraud, covin and misrepresentation.

The plaintiffs replied to the 2nd and 3rd pleas, that the bond was not made by the defendants under and by virtue of the provisions of the statute in those pleas mentioned—and to the 4th plea traversing the fraud.

The plaintiffs suggested no breaches, and there was no condition set out on the record.

Upon the trial, the plaintiffs proved a bond made by the defendant Bowen, "collector of rates for the township of Burford," and by the other two defendants, whereby they bound themselves in £300. "*to the Municipal Council of the Brock District,*" with a condition underwritten, that if Bowen shall collect all rates and assessments authorised and required to be raised, levied and collected, under the authority of any by-law of the Municipal Council of the Brock District, for the support and maintenance of common schools or for the purchase of school sites, or for the erection and repairs of school houses, or for any other purposes not otherwise provided for by law, within the township for which he has been appointed collector, and shall pay all monies he shall so collect to the several parties authorised by law to receive the

same, the payment of which is not otherwise provided for by law, or by by-law of the Municipal Council of the Brock District, except his own per centage, on or before the third Monday in December, in the year 1848, then this obligation shall be void," &c.

A by-law was shewn and proved on the trial, which, reciting the 39th clause of the 4 & 5 Vic., ch. 10, and 10th clause of the 9th Vic., ch. 20, provides, that before the collector received his rate roll from the clerk of the peace he should deliver to him a bond, of which the form, with condition, is given in the by-law—to be signed by two freeholders as securities.

The bond sued on in this case exactly followed the form given in the by-laws as to the condition.

The defendant's counsel objected at the trial, that the bond produced was not made to "*The Council of the District of Brock*," as stated in the declaration, but to the Municipal Council of the Brock District.

2. That the condition of the bond should have been set out.

3. That breaches should have been suggested.

4. That the district council had no power to take such a bond.

5. That the bond could only be taken under the statute 1 Vic., ch 31, and that the district council had no authority to alter the form or manner of security.

These objections were overruled, reserving leave to the defendants to move upon them in *banc*. No evidence was given of monies in arrear. The jury were directed to give a verdict for the debt £300 and 1s. damages.

At the same assizes another case was tried between the same parties. In that action the plaintiffs, *by the same corporate name* as in the other, sued the defendants on a bond made on the 29th September, 1847, in a sum of £600. setting out no condition.

The defendants pleaded only *non est factum*. In this case also, the condition of the bond was in no manner set out upon the record; nor any breach suggested or proved.

A bond was produced exactly similar to the other in form, only being for a different year and in a different sum.

A verdict was taken for £600. subject to the same exceptions.

The defendants, by *Hawke*, obtained a rule to have a verdict entered for them, or for a new trial on the law and evidence. *Read* shewed cause. The authorities cited were—2 Saund. 187 (*a*); 8 T. R. 255; 5 M. & S. 60; 8 M. & W. 65, 645; 10 Co. 124; 11 Co. 19; 1 B. & Bing. 442; 4 T. R. 669; 2 Stark. C. 29; 2 Campb. 548; 2 M. & S. 282; 1 B. & Al. 699; Cro. Eliz. 816; Leach C. C. 1005, 619; 11

Mod. 275; 5 Taunt. 707; Salk. 659; 4 Moore 66; 1 T. R. 232; 3 Taunt. 504; 1 B. & P. 443; 2 Campb. 274; 9 Ea. R. 160; 1 Vic., ch. 21, secs. 17, 18; 4 & 5 Vic., ch. 10, secs. 39, 57; 9 Vic., ch. 20, secs. 8, 27; 1 U. C. R. (O. S.) 403.

ROBINSON, C. J., delivered the judgment of the court.

With regard to the first objection taken at the trial, whatever might have been the case if the bond had been set out on oyer, I think the variance in the name of the corporation is not such as we should hold fatal.

The plaintiffs sue by their right name, given by the statute 4 & 5 Vic., ch. 10—that is, "The Council of the District of Brock," and they sue upon a bond which they say was given to them, the plaintiffs; if they had added by the name of, &c., and then stated the corporate name inaccurately given in the bond, they would have stated the bond as it was, and would only have left room for the question, whether the bond was void or not for want of a sufficient designation. As to that point I think there is no reason to doubt that we are warranted by abundant authority in holding the bond good (*a*). The bond is to "The *Municipal* Council of the Brock District."

It is strange that the public officer who took the bond should not have used the exact name given to the corporation by the statute; but we cannot hold that the variance is so great as to make the bond void. The statute 4 & 5 Vic., ch. 10, calls these councils municipal authorities; and though it has dropped the word "municipal," in the corporate name, yet they are in fact municipal bodies, and are so called in the title of this statute. Then, I think, though I have some doubt on that point, that the bond not having been set out on the record on oyer, the plaintiffs are not bound to the same literal or even verbal exactness, but are safe if they make the identity certain, and preserve clearly the legal effect in the statement. If we must hold, as I think we must, that "The Council of the District of Brock" is the same thing in effect as "The Municipal Council of the Brock District," then the plaintiffs have said truly that the defendants have made their bond to them, *the plaintiffs*, which is all that is asserted.

In *Pitts* v. *James* (Hob. 125), the court held that when a body corporate by the name "Minister Dei pauperis domus de Donnington" made a lease by the name of "Minister pauperis domus Die de Donnington," the variance was not fatal, and Lord Hobart—"So I commend

(*a*) 10 Co. 124; 11 Co. 19; Hob. 125; Leach, C. C. 1005-6; 2 Campb. 548, 278, note; Str. 881; 5 Taunt. 709; 9 Ea. R. 160; *Willes* v. *Barrett*, 2 Stark. C. 29.

the judgment that seems fine and ingenious, so it tend to right and equity, and namely, that in these cases of captious misnomers, doth mould the small disorders of the record to make good the contract and bargain."

I think we must uphold this verdict against the objection of variance, though it would have been far better if the person who framed the form of the bond had used the true corporate name, and if the pleader, when he found that had not been done, had laid the fact according to the exact truth, by averring that the defendants became bound to the plaintiffs by the name of, &c. (*a*)

Then, as to the objections which turn upon the condition not having been set out: It would have been better if the condition had been set out, and breaches assigned in the declaration.. It is the course recommended as being generally the most proper and convenient; and in such a case as this it is particularly proper, because there is room for question whether these plaintiffs, as public functionaries appointed under a statute, could take bonds on any other occasion or in any other form than the law directs. But I apprehend this corporation may, in the exercise of their legal powers, have occasion to take a single money bond, and that we cannot hold that such a bond as the declaration sets out—that is, apparently a single bond to pay a sum of money—would be void.

Then, the plaintiff having declared on such a bond, the defendants plead *non est factum;* and the plaintiffs shewing a bond such as they have declared on must recover, for the condition is only a defeazance, not part of the bond, and the defendants must avail themselves of it if they wish to plead performance. For all that appears in the bond as set out, or in the bond itself when pleaded, it is a common money bond not given by the defendants on any particular occasion or in any public, or official capacity. It is true that in *Ward* v. *Griffith* (1 Lord Ray, 83), when the plaintiff declared on a recognizance of bail and omitted the condition, Powell, Justice, said "If the defendant had pleaded *nul tiel* record, the issue had been with him, for a record which comprises that upon which the plaintiff declares, and more, is not the same record with that upon which the plaintiff declares."

This must proceed upon the peculiarity of its being a record that was

(*a*) Nearly all the cases in Upper Canada, in which the Courts have recognized a variation from the statutory title of Municipal Corporations, will be found in the case of *Barclay and the Municipal Council of Darlington* (11 U. C. Q. B. 470); but now that uniformity of name has been established by the Municipal Act (cap. 54, Con. Stats. U. C.), it is apprehended the Courts will be less inclined to overlook laxness in the description of municipal bodies.

averred; though I confess I think the same principle might have been well extended to ordinary bonds with conditions, and especially when taken to public officers for public purposes; for it is not the same thing to give a bond to pay a sum of money absolutely, and a bond on which nothing can be due until a breach of duty has been shewn. But I take it that as the law is, the plaintiffs were not here bound to set out the condition in order to shew a valid bond, nor in order to guard against any objection of variance if *non est factum* should be pleaded.

Then, as to the remaining objection—that the plaintiff was bound to suggest breaches, and could not take a verdict, as he has done, for the whole penalty upon a bond with such a condition. No doubt this is a bond within the statute 8 & 9 William III. chapter 11, and that the plaintiffs therefore cannot have final judgment and execution to recover the penalty, but must prove breaches and have damages assessed, before the verdict on the issue of *non est factum* can be of any use to them. The court would interfere on motion to restrain execution for the penalty; the only question at present is, whether this verdict must be set aside on the ground that when the bond was produced and the condition proved, it became illegal to render a verdict for the penalty, though the condition was not set out on oyer and did not appear on the record.

It is true, the condition does not in any manner appear upon this record; for, though the defendants plead that the bond was taken for the special purpose of securing the payment over of the rates collected, yet the plaintiffs deny that, and appear therefore to be suing as upon a single money bond.

In the case of *Campbell, executor* v. *Lemon* (1 U. C. R. 403, O. S.), in this court, I intimated, though the case was not disposed of on that ground, that to take a verdict for the penalty where breaches had not been suggested, though the bond came clearly under the statute, was irregular; but there the condition was out on oyer, which makes the question a very different one. I referred in that case to the *Chelsea Water Works Company* v. *Cooper* (1 Esp. c. 273), where, on a bond of the same kind as the present—to secure the due payment over of moneys collected—Lord Kenyon refused to allow the plaintiff to recover the penalty, but made the jury assess the damages, on pleas of *non est factum* and *plene administravit*, though, as I take it from the case, no breach had been suggested, for the plaintiffs contended that the case was not within the statute.

So in *D'Aranda* v. *Houston* (6 Car. & P. 511), Baron Alderson seemed to think that if in a case like the present, he should take a verdict for the penalty, where no breaches had been suggested or assigned

in a replication, such verdict could not be allowed to stand, though he considered that he could not avoid taking the verdict of the jury upon the issue.

On the whole, although if, without any objection having been taken, the plaintiff were in any such case as this to suggest breaches, though after verdict, on a plea of *non est factum*, and go down again before a jury and assess his damages, such a proceeding might be upheld, as the plaintiff, it would seem, may be allowed to suggest breaches after verdict; yet I think, as the statute has been long ago decided to be compulsory, and as this is a case clearly within it, we should hold this proceeding, when the objection has been taken to be in disregard of the statute, and to be irregular, as he tends to put the defendants to unnecessary expense, and leads to confusion and inconvenience.

Although the record did not shew this to be a bond within the statute, yet, when the plaintiff produced it in evidence at nisi prius, it was at once shewn to be so, and that the plaintiff had gone down to trial with his record not properly prepared to suit the case. We shall take the course most convenient for both parties, by setting aside the verdict as irregular.

With respect to the pleas, that this bond was taken under the statute 1 Victoria, chapter 21, on which issue was joined: It is clear, I think, on looking on 1 Victoria, chapter 21, sections 17 & 18—4 & 5 Victoria, chapter 10, sections 39 to 57—and 9 Victoria, chapter 20, sections 8 to 27—that this bond must be looked upon as taken in conformity to the by-law passed under the authority of 4 and 5 Victoria, chapter 10, and was not taken under 1 Victoria, chapter 21.

The result of our consideration of the case is, that the rule must be made absolute for a new trial, and without costs, on account of the irregularity in not setting out breaches under the statute.

Per Cur.—Rule absolute for new trial, without costs.

THE QUEEN V. HAYSTEAD.

Conviction by magistrate quashed—Tolls on Albion Plank Road, when to be collected.

Held, Per Cur., that the following conviction—"*Home District, to wit.*—Be it remembered, that on the 16th day of January, in the year of our Lord 1849, at the City of Toronto in the district aforesaid, Thomas Haystead is convicted before me, S. G. Lynn, one of her Majesty's justices of the peace for the said district, for that he, the said Thomas Haystead, did, on the 4th day of January, inst., evade payment of toll at the toll-gate situated on the Vaughan branch of the Albion planked road; and I, the said justice, adjudge the said Thomas Haystead, for his said offence, to forfeit and pay ten shillings, and also to pay the sum of thirteen shillings and seven pence for costs; and in default of im-

mediate payment of the said sum to imprisoned in the gaol of this city for the space of one month, unless the said sums shall be sooner paid; and I direct that the said sum of ten shillings shall be paid to the Albion Road Company; and I order that the said sum of thirteen shillings and seven pence for costs shall be paid to me the convicting justice. Given under my hand and seal, &c."—was bad, in omitting; 1st. Any statement of the information. 2ndy. The summons and appearance or default of the accused. 3rdly. His plea denying or confessing. 4thly, The evidence. *Also*, in not shewing that any toll was claimed—or what toll—or how imposed—or that any could be claimed or imposed by reason of the completion of the road, or of any part of it. *Also*, because it did not appear therein that the defendant had proceeded on the road with any *carriage or animal liable* to pay toll, and after turning out of the road had returned to or re-entered it, with such carriage or animal, beyond a toll-gate, without paying toll, whereby payment was evaded.

Semble, that tolls on the Vaughan Branch of the Albion Plank Road can only be collected when the road is made, according to the requisition contained in the 33rd sec. of statute 9 Vic., ch. 88.

(P. C., M. T. 13 Vic.)

Ewart obtained a rule nisi to set aside the conviction of Thomas Haystead, which was as follows:

"*Home District, to wit.*—Be it remembered, that on the 16th day of January, in the year of Lord 1849, at the City of Toronto, in the district aforesaid, Thomas Haystead is convicted before me, S. G. Lynn, one of her Majesty's justices of the peace for the said district, for that he, the said Thomas Haystead, did, on the 14th day of January, inst., evade payment of toll at the toll-gate situated on the Vaughan Branch of the Albion planked road; and I, the said justice, adjudge the said Thomas Haystead, for his said offence, to forfeit and pay ten shillings and also to pay the sum of thirteen shillings and seven pence for costs, and in default of immediate payment of the said sums to be imprisoned in the gaol of this city for the space of one month, unless the said sums shall be sooner paid, and I direct that the said sum of ten shillings shall be paid to the Albion Road Company, and I order that the said sum of thirteen shillings and seven pence for costs shall be paid to me the convicting justice.

Given under my hand and seal, &c."

He objected; 1st. That no information is recited in the conviction.

2ndly. That it does not appear by the conviction that Haystead was summoned.

3rdly. That it does not appear whether Haystead appeared or heard the charge.

4thly. That no evidence against Haystead is set forth therein.

5thly. That there is no proper adjudication.

6thly. That the statute under which the conviction is made does not authorize the justice to inflict imprisonment as is done therein.

7thly. That the judgment is not warranted by the statute, though Haystead were guilty.

8thly. That under the circumstances appearing on the depositions on which the conviction is founded, no offence was committed against the statute.

9thly. That no offence against the statute is stated in the conviction.

10thly. That the branch road referred to in the conviction, according to the depositions was unfinished, and therefore no toll was legally demandable from Haystead for travelling thereon.

Vankoughnet shewed cause.

The Albion Road Company is incorporated by statute 9 Vic. ch. 88. The 20th section enacts, that if any person shall, after proceeding on the road with any *carriage* or *animal liable to pay toll*, turn out of the said road into any other road and shall enter the said road beyond any gate without paying any toll, whereby such payment shall be evaded, such person for each offence shall forfeit not exceeding £5 nor less than 10s., and any one justice of the peace shall, on conviction, fine such offender in the said penalty, and from his judgment there shall be no appeal. The 19th section provides for the levying of penalties by distress and sale of the offender's goods and chattels, under the authority of a justice's warrant, and in case there are no goods and chattels to satisfy such warrant the offender may be committed to the gaol of the Home District for any period not exceeding twenty days. The 15th section empowers the directors, among other things, to make rules and regulations "concerning the tolls of the road;" and the 16th section empowers the president and directors from time to time to order and establish the rates of toll payable by persons travelling on the road. And the 1st section provides, that as soon as three miles of the road shall have been completed, it shall be lawful for the directors of the company to put up and erect a toll-gate thereon, and collect such tolls as the directors may think expedient to be levied and taken from persons travelling along the road. While the 38th section, which relates in terms to a continuance of the road "from its present intended termination at Gedde's Corner," and to a branch road "through the townships of York and Vaughan, commencing at the line of the township of King between the 8th and 9th concessions, and following the public highway laid out and known as the King road to the township of York, so as to intersect the Albion road at some point between its commencement in rear of lot No. 12 in 5th concession and Conatt's corner in concession A., in the township of Etobicoke," authorises the company "upon the completion of such road or roads, to erect toll-bars and collect tolls *in the manner hereinbefore* by this act provided for *that* or *similar* purposes."

Questions were raised during the argument, whether, under this latter clause, the company could collect tolls on the branch road last mentioned, which was conceded to be the one referred to in the conviction, before the whole was completed, or before at least three miles, "commencing at the line of the township of King," &c., were finished.

DRAPER, J.—It may be difficult really to ascertain the true construction of the statute on these points, for its povisions are not at first view consistent with one another, nor does its whole frame indicate the work of a careful or experienced draftsman. But the facts are not brought before the court in such a manner as to call for or indeed to afford material for adjudicating these questions; and the conviction is clearly bad on other grounds.

The statute gives no power of conviction, and therefore the present one must be upheld under the statute of U. C. 2 Will. IV., ch. 4, if it can be sustained at all. It is only necessary to refer to that statute in order to see that this omits many important particulars: 1st. Any statement of the information. 2ndly. The summons and appearance or default of the accused. 3rdly. His plea denying or confessing. 4thly. The evidence.

The offence of which Haystead is convicted is stated to be, that he did "evade payment of toll at the toll gate situate on the Vaughan branch of the Albion planked road." It does not appear that any toll was claimed, or what toll, or how imposed, or that any could be claimed or imposed by reason of the completion of the road, or any part of it. The offence meant to be charged was, I assume, that provided for by the 20th section; but if so, it is most incorrectly stated, for it does not appear by the conviction that he had proceeded on the road with *any carriage or animal liable to toll*, and after turning out of the road had returned to or re-entered it, with such carriage or animal, beyond a toll-gate, without paying toll, whereby payment was evaded. These defects are, in my opinion, fatal, and the conviction must therefore be quashed.

The counsel for the defendant stated that the parties were very anxious to obtain the opinion of the court as to the power of the company to impose tolls for travelling on the branch road under the circumstances stated. I have not felt it necessary to make up my mind finally on this question; but for the present confine myself to stating, that the strong inclination of my mind is, that tolls on the branch road can only be collected when the road is made, according to the requisition contained in the 33rd section of the statute.

Per Cur.—Conviction quashed.

Consumers' Gas Company v. Nicolls.

Statute 11 *Vic., ch.* 14—*Consumers' Gas Company of Toronto—Assumpsit—Averments in declaration.*

Under the statute 11 Vic., ch. 14, the Consumers' Gas Company of Toronto may sue *in assumpsit* for calls; the remedy is not confined to debt.

In so declaring *under the act*, an averment of consideration to support the promises is not necessary; neither is it necessary to lay the promise to pay on any *certain day*. The general terms, that the defendant *afterwards* promised to pay, is sufficient.

Declaration—Assumpsit.—For that whereas the defendant heretofore, to wit, on the 10th day of November, 1848, was, and for a long time previous thereto had been, and still is, the holder of divers, to wit, ten shares in the stock of the said company; and being such holder, then was and still is indebted to the plaintiffs in £56 5s., of lawful money of Canada, the same being the amount of divers, to wit, five calls before then made and payable, in respect of each of the said shares of the defendant. By reason whereof defendant became liable to pay to the plaintiff the amount of the said calls, by force of the statute in that behalf, on request, and being so liable afterwards (objected that there should be a day named here) promised the plaintiffs to pay them the same. Yet he hath not paid the same, or any part thereof, to the plaintiff's damage of £100, and therefore they bring suit, &c.

Demurrer.—Because the declaration sets forth or discloses no good or sufficient consideration to support an action of assumpsit, and because the plaintiffs should have sued the defendant in an action of debt; also for, that it is not stated in the said declaration, when the said calls therein mentioned were made, nor are the facts set forth with sufficient certainty of time as in a special action of assumpsit they should be.

Eccles for the demurrer. *Hagarty* contra.

The authorities cited were—2 Chit. Pl. 44; 1 Chit. Pl. 118; *Simpson* v. *Johnson*, Dougl. 10, 387; *Rann* v. *Green*, Cowp. 465: *The Southampton Dock Company* v. *Richards*, 1 M. & Gr. 448.

Robinson, C. J., delivered the judgment of the court.

We see no reason why assumpsit should not be brought under the statute 11 Vic. ch. 14, for calls, though undoubtedly the action under similar statutes is more commonly in debt.

The statute itself does not confine the remedy to debt, but provides that the calls, when not paid, may be sued for in any court having competent jurisdiction; and in giving a general form of declaring, it allows the plaintiff to state that the defendant is the holder of certain shares, and that he *is indebted* to the company in the sum to which the calls in arrear may amount.

That is quite consistent with the action, being one of *indebiatus* assumpsit. The claim is wholly founded on contract; the defendant, by subscribing, engages to pay to the company the money subscribed, in such instalments as they may call for. The short and convenient form of declaring given by the statute, enables the plaintiffs, without prolixity, to shew in general terms a certain sum due for calls; and I can see no possible objection to the plaintiffs availing themselves of that form of declaring, when they mean to lay an assumpsit to pay the debt thus ascertained, as well as when they mean to declare in debt.

In Chitty's Pleadings, vol. 2. p. 44–5, there are many precedents of declarations in assumpsit for calls, where I suppose the statutes were similar to this. And he concludes, that though a statute may in some respects be considered as a specialty, yet assumpsit may be supported for money, &c., accruing due to the plaintiff under the provisions thereof, when he is not thereby restricted to any other particular remedy.—1 Chit. Pl. 118; Dougl. 10, note A; Bac. Arb. Assumpsit.

In *Rann* v. *Green*, Cowper, 475, Lord Mansfield says: "Here the action, which is an action of assumpsit, is brought in consequence of a right liquidated by means of the statute. The statute therefore is the only ground of action. Without we had no authority to make the order we did; but when the order was made, the law raised an assumpsit."

Then the plaintiffs, being at liberty, as we think they were, to sue in assumpsit, we must look on this as an action brought under the authority of the statute, and to which therefore its provisions apply, so far as they are are applicable. An averment of consideration was not necessary (the want of which is one of the objections taken), because the statute creates the debt, and that is the consideration for the promise.

Then as to the exception that the facts are not set forth with sufficient certainty of time, the statute expressly dispenses with the necessity of setting forth the facts specially, and says that it shall be sufficient to allege what in this case is alleged.

The only exception about which it seems to me there can be a question, is that on which it appears the defendant chiefly relies, and which is one purely of form—namely, that the plaintiffs have not laid the promise to pay to have been made on any certain day, but in general terms, "that the defendant *afterwards* promised to pay."

The defendant's argument is, that though the plaintiffs are entitled by the statute to allege the existence of the debt in such general terms as they have done, and if they had contented themselves with suing in debt for that debt, nothing more would have been necessary, yet that they have travelled out of the form in laying an assumpsit, and there-

fore, as to that part of their declaration, they have not the aid of the statute and must abide by the common rules of pleading.

I observe, on referring again to the short forms which are given by Mr. Chitty of declarations in assumpsit for *calls*, that the promise is laid on a particular day. But when it is determined that the statute admits of declaring in this form of action, and enacts that it shall not be necessary to set forth the *special* matter, and describes what it shall be sufficient to allege, the question is, whether it is consistent with the spirit or design of such a statute to declare a declaration bad on special demurrer, because it does not conform to precedents in a particular on which the statute is silent, but omits something which is in the strictest sense matter of form, being the mere supposed time of a promise which was never in fact made at any time; but is merely imaginary, being implied by law.

Per Cur.—Judgment for the plaintiff on demurrer. (*a*)

WILT V. LAI, SEN., & LAI, JUN.

As to mortgages on a Sunday being void, under 8 Vic., ch. 45. sec. 2.

The giving or taking *in security* on a Sunday is not void as "a buying or selling" within the Provincial Statute 8 Vic., ch. 45, sec. 2.

(Q. B., H. T., 13 Vic.).

Trespass—*quære clausum fregit.*

1st count: Entering and expelling plaintiff.

2nd count: Breaking and entering, cutting and taking away grass, buck-wheat, &c.

Pleas: 1. Not guilty.

2. That the close was not plaintiffs,—nor the grass, corn, &c.

3. That the close was the freehold of the defendant, Nicholas Lai, sen., wherefore he and the other defendant entered, &c.

Verdict for plaintiff on 1st and second issues. Damages assessed for the value of certain fall wheat taken by defendants, 35*l.*, and for the residue of the crops taken by defendants 53*l.*, and for defendants on third issue.

And it was by consent reserved at the trial as a question whether, upon the evidence, the plaintiff was entitled to recover in respect to

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(*a*) In an action brought by an incorporated company against a shareholder, for calls, the defendant pleaded that he became a holder of shares by subscription, and was induced to become such subscriber and holder by the fraud of the company; that he had received no benefit therefrom, and that he had repudiated the shares. The plaintiff demurred, and the plea was held good on demurrer.—*Provincial Insurance Co.* v. *Brown & Demroche*, 9 U. C. C. P. 385.

the fall wheat; if not, the 35*l.* was to be disallowed, and the plaintiff was to enter up judgment only for the residue of the damages found.

The question depended upon the point, whether a bill of sale made by plaintiff to the elder Lai, one of the defendants, of the crops on the ground (which included the wheat in question) was not void under our statute 8 Vic. ch. 45, sec. 2, being made on a Sunday, as it was proved to be, and being not a transfer by way of absolute sale, but a mortgage to secure the payment of a certain sum of money, due by plaintiff to Lai, and so expressed to be made in the writing.

Freeman obtained a rule to reduce the verdict on the leave reserved. *Duggan* shewed cause. The authorities referred to were 7 Vic. ch. 45, sec. 2, 3; 6 U. C. R.; 6 Bing. 554; 3 M. & W. 144; 4 M. & W. 282.

ROBINSON, C. J., delivered the judgment of the court.

In a case between Lai and Stall (*ante* p. 205), in which the same instrument and the effect of it came before us to be considered for another purpose, I intimated in my opinion, though the question was not necessary to be determined in that case, that the prohibition in the second clause did not extend to the case of a mortgage, but only of a sale in the common acceptation of that term.

The words of the statute are, that "all sales and purchases, and all contracts and agreements for sale or purchase of any real or personal property whatever, shall be utterly null and void."

The instrument in question was executed on a Sunday. It professes to give in security to the defendant Lai "the personal property specified in the inventory at the foot of the writing; to hold the same until such time as he, the said Joseph Wilt, shall pay to the said Nicholas Lai, the sum of 78*l.* 15*s.*; and as soon as the said Joseph Wilt shall pay to the said Nicholas Lai the above sum, then the goods and chattels mentioned in the inventory shall be restored to the said Joseph Wilt by the said Nicholas Lai."

To the inventory, which is written below the signatures and seals of the parties, there is this heading: "Inventory of goods and chattels delivered to N. L. by J. W., in security of the above mentioned sum of 78*l.* 15*s.*, *to be paid on the 1st day of September*, 1848.

If no day of payment had been mentioned in the heading of the inventory, as there is none in the body of the writing, then the only effect would be to create a lien in the nature of a pawn. It would neither have been an absolute sale, nor a conditional sale, subject to a defeasance by paying on a certain day—in other words a mortgage; but we may look on the words in the heading of the inventory as part of the

instrument, and they would give it the operation of an ordinary mortgage of personal property, conditioned to be void on payment of a sum by a day named.

The point is whether that comes within the statute, and is therefore void, as it must be if it comes within the word sale or purchase.

The opinion that it did not, expressed in the case referred to, was only my own impression at the moment, considering as I did that the statute, creating as it does new offences, was part of the criminal law—not to be extended by any liberality of construction to cases not within the letter; and also considering that the natural right to transfer one's property was not to be interfered with under the pretence of any positive law, farther than such positive law in terms restrained it. I have difficulty still in making up my mind to any other view of the question.

If an indictment or conviction, framed under the third clause of the same statute, which speaks only of *selling* or *purchasing* property, were to charge only that the defendant as a security gave certain property to be held in security—in other words, that he mortgaged it—I do not consider that it could be sustained, because it would not charge any offence specified in the act: and if the charge were for buying or selling, then I think in the administration of criminal law, it could not be supported by evidence of a giving in security merely,—because that really is not in strictness a buying and selling. Nor can we properly give the words a greater latitude of construction in order to hold this transaction void, when relied upon in a civil action. Not long ago we found it right to hold that a mortgage of a ship came within the word "sold," as used in the 13th clause of our Ship Registry Act, 8 Vic. ch. 5; so that the mortgage would be void unless it contains a recital of the certificate of ownership, *Watkins et al* v. *Corbet*, 6 U. C. R. 587.

The act contains within it sufficient evidence that the provision was intended to apply to mortgages; and in England the same form of words has been held to embrace mortgages of ships; and in the reason of the thing they ought to be included, considering the purposes for which the certificate was required to be inserted—namely, to afford convenient and ready means of obtaining precise information. There is not the same argument for latitude of construction in this case; but on the other hand it must be admitted to be in general true, that a mortgage is looked upon in law as a sale subject to a defeasance, or qualified, not an absolute transfer.

In *Drury* v. *Defontaine* (1 Taunton, 135), Sir James Mansfield, C. J., when the question arose—as it does here, incidently in a civil action—declined to extend the prohibitions contained in 29 Car. II. ch. 7,

passed for the better observance of the Lord's Day, by any liberality of construction beyond the letter. He said, the bargaining for and selling horses on a Sunday was certainly a very indecent thing, and what no religious person would do; but that the law had not gone so far as to say that every such contract made on a Sunday shall be void, but only those made by persons in the ordinary exercise of their calling; and in conclusion he said, "although it is to be lamented, the sale must be held good."

In *Fennel et al* v. *Ridler* (5 B. & C. 406), Mr. Justice Bayley, though he did not at all question the decision in the case I have just cited (for the point to be determined by him was not affected by it), seemed disposed to look upon the act as one that ought to be liberally construed for advancing its object. "The spirit of the act," he said, "is to advance the interests of religion, to turn a man's thoughts from his worldly concerns and to direct them to the duties of piety and religion, and the act cannot be construed according to its spirit unless it is so construed as to check the course of worldly traffic." And in another part of his judgment the learned judge held, that "the statute is entitled to such a construction as will promote the ends for which it was passed;" but when he determined that the transaction then under his consideration came under its prohibition, he rested his judgment not only on the principle that the purchase by the plaintiff was within the mischief intended to be suppressed, but he held also that "*it was within the words made use of to suppress it.*"

The question before us cannot be solved by either of these decisions I refer to them only to shew that the point whether we are at liberty to construe the act liberally for the prevention of indecent trafficking on a Sunday, or must take it strictly according to its letter, is one on which different language has been at different times held by courts of law in England. I incline still to think that a giving or taking in security is not a buying or selling within the statute, and that we cannot thereby clearly hold this transaction to be void.

That appears to me to be the soundest construction of the act, considering, as I think we must, that we cannot consistently hold a mortgage to come within the words "sale or purchase," in the second clause of the act, unless we could also give the same comprehensive construction to the words "sale or purchase," as used in the third clause, and we could not, I think, do that without violating well settled principles of law.

My brothers, I believe, concur in this opinion; and the verdict is to be entered accordingly, excluding the value of the fall wheat, which we

hold to have passed to Lai, in security for his debt: but not as on a sale. See *Wouleston* v. *Parsons*, 9 U. C. R. 481.

Per Cur.—Verdict to be entered, excluding the value of the fall wheat. (*a*)

DOE DEM. CROOKS V. TEN EYCK.

DOE DEM. CROOKS V. CALDER.

Township of Binbrook—Erroneous survey—Acts 1 Wm. IV. ch. 8, 7 Wm. IV. ch. 59, remedying same—Married woman owning land in Binbrook.

Under the statutes 1 Wm. IV. ch. 8, and 7 Wm. IV. ch. 59, passed for the purpose of remedying an erroneous public survey, an inhabitant living in the front concession of the township of Binbrook cannot be dispossessed by an ejectment brought, after a prior submission to arbitration, by the husband of a married woman owning land in the adjacent township of Saltfleet, the husband not being the owner of the land, to whom alone these acts apply.

(Q. B., E. T., 13 Vic.)

In each of these cases the action was brought for land in the first concession of Binbrook, and a verdict was rendered for the defendant,

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(*a*) The previous cases with regard to Sunday Trading are as follows:

"To avoid a contract made on a Sunday, it must be shown to be in the ordinary calling of the party making it."—*Bethune* v. *Hamilton*, MS. Rep. Hilary Term, 4 Vic.

"Where A had received money on an agreement to deliver timber to B, and afterwards refused to deliver the timber, and was sued by B to recover the money back, it is no defence in such an action to show that the agreement was made on a Sunday and therefore void under 8 Vic. c. 45; for if void, that would be no reason why the money received under it should not be refunded."—*Vail* v. *Duggan*, 7 U. C. Q. B. 568.

"An attorney is not liable for culpable negligence in not urging for his client the defence that the agreement upon which he was sued was made on a Sunday, as it is no part of his duty to take all dishonest advantages."—*Ibid.*

The following are some of the English cases on the same subject:

"One S sent a mare to M, a farmer, to be covered by a stallion belonging to him, on a Sunday—*Held* that the contract was not void under 29 Car. II. c. 7, it being made by M in the exercise of his ordinary calling; but that even if it were, the contract having been executed, a specific lien for the charge attached to the mare, and that it might accordingly be detained."—*Searfe* v. *Morgan*, 4 M. & W. 270.

"To a count for goods sold and delivered, the defendant pleaded that they were goods sold and delivered to him on a Sunday, contrary to the statute. The plaintiff replied that the defendant, after the sale and delivery of the goods, kept them for his own use without returning or offering to return them, and had thereby become liable to pay the sum mentioned in the plea, being as much as they were reasonably worth—*Held* bad on demurrer."—*Simpson* v. *Nicholls*, 3 M. & W. 240.

"An attorney entering into an agreement on a Sunday for the settlement of his client's affairs, and thereby rendering himself personally liable, is not a person exercising his ordinary calling within 29 Car. II. c. 7."—*Peate* v. *Dicken*, 1 C. M. & R. 422.

leave being reserved by consent at the trial to move this court to enter a verdict for the plaintiff upon the evidence.

By the statute 1 Wm. IV. ch. 8, after reciting that the inhabitants living in the front concession of Binbrook had made improvements and erected buildings on the front of the said first concession, in accordance with a line run by Mr. Wilmot, a deputy provincial surveyor, employed by the government, which line had been since found to be erroneous, encroaching on the eighth concession line or rear boundary of Saltfleet; and that the said persons, whose improvements were thus found to have been made by error on lands in the 8th concession of Saltfleet, which was supposed to form part of the first concession of Binbrook, not having encroached knowingly or with any wrong intention, it was expedient to make provision by law for settling the difficulties likely to arise in consequence of such error, it was enacted that the proprietors of lots in the eighth concession of Saltfleet, on which improvements may have been made by persons who supposed the land to form part of Binbrook, shall not have power to dispossess the persons who have so improved until an arbitration has been resorted to for settling the matter in dispute between them; and the statute provides that where the parties cannot agree between themselves, each party shall choose an arbitrator, and the two arbitrators shall choose a third, and the three shall have full power to determine the matter in difference; that they shall assess the value of the improvements, and the value of the land in an improved state; and the owner of the land shall have the option whether he will retain the land and pay for the improvements, or accept the assessed value of the land without improvement; and the award may be made a rule of the Court of King's Bench.

In 7 Wm. IV. another act was passed, ch. 59, which recites that the former act was defective, in not making provision for cases in which the persons who had erroneously improved on lands in Saltfleet should refuse to arbitrate, and yet keep possession of the land; and it provides that whenever any such person, having three months' notice to appoint an arbitrator, shall refuse or neglect to do so, the judge of the district court may nominate an arbitrator on his behalf.

It was proved that on the 24th of May, 1809, the crown granted by patent lots Nos. 14 and 15, in the 8th concession of Saltfleet, to Mrs. Jane Crooks, wife of James Crooks, Esquire, and daughter of Thomas Cummings, Esquire, an U. E. Loyalist. The land in question, in the action against Ten Eyck, was claimed by Mr. Crooks, the lessor of the plaintiff, in the right of his wife, as being part of lot 14, mentioned in the patent.

An award was produced and proved, made on the 30th October, 1847, under the statute, whereby the arbitrators chosen, as the act 1 Wm. IV. ch. 8 directs, awarded that they had found this defendant Francis Ten Eyck to have improved upon six acres two roods and eleven and a quarter perches of the plaintiff's land, being lot 14, 8th Saltfleet. They awarded also that this land, in its uncultivated state, would be worth £14 15s. 8d., being at the rate of £2 5s. 0d. per acre, and that the value of the improvements made was £31 4s. 2d.

It was proved that this award had been made a rule of court, and that the lessor of the plaintiff had served the defendant Ten Eyck with copies of the award and rule of court, and had demanded in a formal manner, by his attorney properly authorized, the £14 15s. 8d., being the assessed value of his land encroached upon, and that the defendant refused to pay the same until he received a deed for the land.

The statute contains nothing express upon the subject of the conveyance of the land to the person willing to retain the land and pay the assessed value. The price being refused, the plaintiff brought this ejectment to recover the land.

It was objected on the part of the defendant at the trial, that the lessor of the plaintiff should have tendered a deed of the land, and that he alone could not make a title to the fee, having only a temporary right to the possession in right of his wife.

The defendant also set up a defence under the Statute of Limitations. He proved that a patent had issued on the 26th April, 1819, to one Thomas Condon, for the north half of 3 in block 1 in Binbrook; that he made improvements on the land, and lived on it, and sold it to one Smith, who also lived on it till he sold it to one Bryan Condon, by whose heir it was sold to Ten Eyck, this defendant; and that for more than thirty-five years this land has been continually occupied by the several claimants under these titles.

The Chief Justice directed, on this evidence, a verdict for the defendant, reserving leave to the plaintiff to move to have a verdict entered for him, if the court should be of opinion that upon the evidence any good ground appeared for holding that the plaintiff was not bound by the Statute of Limitations.

Crooks obtained a rule to have a verdict entered for the plaintiff, upon leave reserved. *Hector* showed cause.

The statutes 1 Wm. IV. c. 8, and 7 Wm. IV. c. 59, were referred to.

ROBINSON, C. J., delivered the judgment of the court.

It did not strike me at the trial that the plaintiff could be held not to be barred, being in a condition, as it appears to me, to establish his

right and sue for his land more than twenty years ago; for the statute 1 Wm. IV. ch. 8, conferred no new right. The owners of land in Saltfleet, up to the time of passing that act, could have brought their actions, though it is true that from that time till the passing of the act 7 Wm. IV. ch. 59, their action was suspended, and without their power to remedy it, if the other party should decline concurring in the appointment of arbitrators.

This state of things between these parties, presents several questions. It is clear that what the legislature meant by passing the statute 1 Wm. IV. ch. 8, was to protect the patentees of lands in Binbrook from being dispossessed of lands in Saltfleet of which they had ignorantly taken possession, until they should be paid for their improvements, because they had been misled by an erroneous public survey, and had reason to believe that the land was covered by their patents; but there are several defects in the statute.

Mr. Crooks, the lessor of the plaintiff, is not the owner of the land in question, but is only seized in right of his wife. The statute makes no provision for the case of married women being proprietors of lands in Saltfleet, while all its enactments apply only to the persons *owning the lands.*

It is the owner of land only who is to submit to arbitration, "in case he and the proprietor of adjacent land in Binbrook, who has unknowingly trespassed upon him, *cannot settle the matter in dispute between themselves.*" Now, Mr. Crooks could not, by any act of his own, have made a settlement of the disputed boundary which would have bound his wife or her heirs; and, as the act only proposes an arbitration in default of such agreement, it is to be inferred that the legislature contemplated a submission to arbitration by such persons only as could have bound the title by his acts—in other words, by the owner—where no special provision beyond that is made. The third clause enacts that the owner may submit to arbitration; it goes no further; and the sixth clause provides that it shall be optional with the owner of the land to pay the assessed value of the improvements, and keep his land, or to receive the assessed value of his land; in which latter case it must have been intended, though it is not so expressed, that the land should become the property of the other party; but the act neither provides that it shall, nor contains any direction that the land shall be conveyed to the person from whom the assessed price has been accepted.

We consider, in the absence of anything express in the act on that point, that the title must be treated as being bound by the option declared, that the effect of the proceeding would be to constitute a sort

of parliamentary conveyance, and at least that the former owner could not afterwards sustain an ejectment to dispossess the party from whom he received the price of the land, or any one claiming under him.

But the difficulty here is, that the owner of the land has not submitted to arbitration. No award has been made that binds her title, and she has not yet declared an option, if she is legally competent to do so. Then this stands as a case where the statute has not been legally acted upon, as regards arbitration, and in which, consequently, the owner cannot maintain ejectment, nor any one in right of the owner, until a binding arbitration has taken place, such being the effect of the statute 1 Wm. IV. ch. 8.

The consequence is, that the rule which has been obtained for entering a verdict for the plaintiff must be discharged; not, however, on the ground that the plaintiff is barred by the Statute of Limitations, for that question is not decided.

This case suggests the necessity of some legislative amendment of the act 1 Wm. IV. ch. 8, as regards the case of married women; also, as to the effect of that statute in restraining possession—in suspending the operation of the Statute of Limitations, and the evidence of title to be furnished to the occupant when he pays the price of the land; and it might in some other respects be made plainer.

Per Cur.—Rule discharged.

HAWKESHAW (ADMINIST.) V. DALHOUSIE DISTRICT COUNCIL.

Liability of District Council to individuals for not keeping steps of District Court House in repair—statute 10 & 11 *Vic. ch.* 6.

Under the provincial statute 10 & 11 Vic. ch. 6., *a District Council* cannot be made liable in damages for an injury, resulting in death, occasioned to an individual in walking up the Court-house steps, which has been allowed to fall into an unsafe and dangerous condition. The Council was charged in this declaration as having the Court-house under their control and as bound by law to keep it in repair; and judgment was arrested on this averment, as the act 4 & 5 Vic. ch. 10, sec. 46, throws the responsibility of keeping the Court house in a proper state of repair on the district surveyor, upon whose report in the first instance, as to the necessity of the repair and the expense, the Council have to pass a bye-law.

Quære—Would the Council be liable to an individual for not passing such a by-law after the report of the surveyor had been submitted.

(Q. B., E. T., 13 Vic.)

Action on the case founded on the statute 10 & 11 Vic. ch. 6, to recover damages on account of the death of Oliver Hawkeshaw, charged to have been occasioned by the neglect and default of the defendants, in not repairing a public building under their control.

The plaintiff sued as administratrix of Oliver Hawkeshaw. The declaration contained two counts. In the first the plaintiff declared, that on the 4th of July, 1848, and from thence till after the time of the grievance complained of, the said Oliver Hawkeshaw was a constable for the township of Nepean, in the district of Dalhousie; and that on the said 4th July, and while he was such constable, the court of general Quarter Session of the peace, and the District Court for the district of Dalhousie; were being holden at the Court-house of the said district at Bytown, at which courts the said Oliver Hawkeshaw was in attendance, discharging his duty as constable; that while he was so attending, &c., viz., on, &c., the steps of the said Court-house leading into the same, and by which access to the said Court-house was usually and customarily had, by all persons lawfully and necessarily frequenting the same, were, and for a long time had been, in an unsafe, insecure, dilapidated and ruinous condition, and unsafe and unfit to be used for the purposes aforesaid; that the said Oliver Hawkeshaw, as such constable, *and in the discharge of his duty as aforesaid, "then having occasion to use the said steps,"* and being then on and near the same, the said steps by reason of and in consequence of such, their unsafe, insecure, ruinous and dilapidated condition as aforesaid, suddenly gave way and fell, and divers large quantities of the stones and other materials of which the same were composed then fell upon and across the limbs of the said Oliver Hawkeshaw, by means whereof the legs of the said Oliver Hawkeshaw were then broken and fractured, and the said Oliver Hawkeshaw then received and suffered divers other wounds and bruises in other parts of his body, whereby the said Oliver Hawkeshaw then suffered great pain, and remained and continued in such pain, &c., from thence until the fourth day of August in the year aforesaid, when he languished and died; by means whereof not only the said Oliver Hawkeshaw was put to great expense, to wit., to £50, in endeavouring to cure the said wounds, and was hindered from attending to his necessary affairs, but the plaintiff since his death has incurred and been put to great expense, as administratrix as aforesaid, to wit., £10, in and about the burial of the said Oliver Hawkeshaw.

And the plaintiff further averred, that at the same time the said Oliver Hawkeshaw was so injured as aforesaid, by the fall of the said steps, to wit., on the day and year aforesaid, and a long time before, *the said court house was the public property of the said District of Dalhousie, and under the control, care and management of the district council for the district of Dalhousie aforesaid;* and the plaintiff further averred, that long before the said accident so happening to the said

Oliver Hawkeshaw, and while the said steps were in such unsafe, dangerous and dilapidated condition, as aforesaid, viz., on, &c., *the defendants had full knowledge, and were notified thereof, and requested to repair and amend the same*, but notwithstanding such request, and notwithstanding such their knowledge as aforesaid, the defendants then wholly refused to amend or repair the same, and from thence until, and at, and after the said *accident, wholly neglected and refused to repair or amend the same, although it was the duty of the defendants, during all the time aforesaid, to keep the said court house steps in good and decent repair*, and in a firm and secure condition; and although the defendants *had, during all the time aforesaid, sufficient means and funds of the said district* at their disposal, *and applicable for the purpose of such repair* and amendment as aforesaid; and the plaintiff averred that the said accident and injury and subsequent death of the said Oliver Hawkeshaw, as aforesaid, happened *by and through the mere and gross negligence of the said defendants, and inattention to their duty in that behalf.*

The second count stated that before and at the time of the grievances thereinafter mentioned, to wit, on the 4th July, 1848, the steps of and leading to the court house of the said district of Dalhousie, were in an unfirm, unsafe and dilapidated condition, and greatly in want of repair, of all which the defendants then had due notice; that the said Oliver Hawkeshaw being then a constable, duly appointed, &c., was then, to wit, on, &c., in the discharge of his duty as such constable, at the court house aforesaid, and then and there had occasion to use, and did use the said steps of and leading into the said court house; and that while the said Oliver Hawkeshaw was so using the said steps, the same, in consequence of their bad condition and want of repair, as aforesaid, gave way and fell down, and divers quantities of stone, mortar and other materials, of which the same were composed, fell upon, &c. (describing the injury and damage to the said Oliver Hawkeshaw as before, and his death).

And the plaintiff then averred, that long before and at the time of the said fall of the said steps, the said court house *was the public property of the said district, and under the control of the defendants, and that they were bound by law to repair and amend the same;* and that the fall, and the injury to the said Oliver Hawkeshaw occasioned thereby, happened as aforesaid by and through the mere negligence, carelessness, neglect and default of the defendants; by means of which premises the plaintiff, as such administratrix, as aforesaid, hath sustained damages to £5,000, and therefore, &c. (concluding with profert of the letters of administration to the plaintiff.)

The defendants pleaded:

1st. Not guilty to the declaration.

2nd, to 1st count, that Oliver Hawkeshaw was not a constable duly appointed for the township of Nepean.

3rd, to 1st count, that he was not then there in discharge of his duty as constable, as alleged.

4th, to 1st count, that the steps were not, and never had been, in an unsafe and ruinous condition, as alleged.

5th, to 1st count, that at the said time when, &c., the *said court house was not under the control, care and management of the defendants*, in manner and form, &c.

6th, to 1st count, that the defendants had not full knowledge of the unsafe and dangerous condition of the said steps, &c.

7th, to 1st count, that they were not requested to repair the steps in manner and form, &c.

8th, to 2nd count, that the steps at the said time when, &c., were not in an unfirm and unsafe condition, and greatly in need of repair, &c., in manner and form, &c.

9th, to 2nd count, that the defendants had not before or at the time when, &c., notice of the steps being unsafe, &c.

10th, to 2nd count, that Oliver Hawkeshaw was not at the time when, &c., a constable duly admitted and sworn, &c.

11th, to 2nd count, that the court house at the said time when, &c., *was not under the control of the defendants.*

Verdict for the plaintiff £50, to be apportioned as follows: £10 to the plaintiff, and the balance to be equally divided among the children under twelve years of age, viz., Ellen, Elizabeth, George, John and Susan Hawkeshaw.

H. Eccles obtained a rule to arrest the judgment, on the ground that the causes of action set forth were not sufficient in law to support an action or judgment against the defendants.

G. Sherwood showed cause.

The authorities referred to were, 6 Clk. & F. 894; 3 M. & W. 1; 11 Jurist, 758; 2 Car. & Kir. 661; 4 Taunt. 649; 2 H. Bl. 350; 2 T. R. 672; 5 Bing. 108; 2 Saund. 158; 4 & 5 Vic. ch. 10, secs. 37, 39, 46, 47, 43.

ROBINSON, C. J., delivered the judgment of the court.

The provisions of this statute, which is similar to one lately passed in England, are, that whenever the death of a person shall be caused by "wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured

to maintain an action and recover damages in respect thereof, then the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

The first question, then, is, if Hawkeshaw had been injured only, and had not died, could he have brought an action against the district court for the injury he sustained in consequence of the steps of the district court house being insecure, and falling when he stepped on them? That raises several questions. Is a private individual bound to keep in repair the premises which he occupies? I have not succeeded in finding any action founded on such a principle. He is bound to create no nuisance on his premises, by which persons coming to them on a lawful occasion may suffer injury: for instance, if he should leave a well which he was digging without guard or protection, or a deep ditch, or a cellar for an intended building, or if in the course of building or making repairs he should negligently leave building materials in a situation which exposed others to injury, I assume that he might be liable for damages thus occasioned; but, if the defendants were the private occupants of the building in question for their own use, and had allowed the steps leading to the front door to be rotten or out of repair, and a person who came to them on business or by invitation had fallen and been injured, could such person have maintained an action? I do not say that he might not, but should hesitate before determining that he could. It would be necessary to reflect on the consequences to which that might lead. The difference is between misfeasance and nonfeasance—between the making or placing something in such a manner as may occasion injury, and the not sustaining premises in a sound state of repair. If from the latter cause a nuisance is occasioned to a highway adjoining, no doubt an action would lie.

But admitting that if the defendants had been occupying the building as owners or tenants, they would have been liable to Mr. Hawkeshaw in damages if he had been merely hurt by the stone step falling as it did, and from the cause alleged, still the difference between such a case and the present is, that the defendants are not in this action charged as occupants, on the principle affirmed in *Payne* v. *Rogers*, 2 H. Bl. 350. This declaration in both counts grounds the action wholly on the defendants' neglect of a public duty. The court house is truly stated to be a public building, and the averment is, that it was under the care and control of the council, and that they were bound by law to amend and repair it.

But we must take judicial notice that by the 37th clause of the statute 4 & 5 Vic. ch. 10, it is made the duty of the district surveyor, "*to take care of all fixed property belonging to the district,*" and to report to the warden as often *as need may be*, upon the state of such property, with an estimate of the expense required for anything recommended to be done.

All that the district council is to do or can do in the matter, is to pass by-laws for authorizing the work and raising and appropriating the necessary funds; and the 46th clause requires that before doing this they must receive from the district surveyor an estimated expense of such work.

The legislature having provided for the appointment of a district surveyor, and made it his duty to take care of all the fixed property of the district, and to report upon its state to the council, with an estimate of anything necessary to be done, they have thereby, in my opinion, relieved the council from the onus of judging at their peril of the state of all the public buildings of the district, and have left to them only the duty of passing such laws in this respect as may be necessary for carrying out the recommendations of the responsible officer. The complaint is, in fact, that they did not pass a proper by-law. But admitting, which I am not prepared to do, that an action will lie against a municipal council for omitting to exercise their legislative functions, it should at least be shown that the proper officer had reported upon the necessity of the repair in question, and submitted an estimate of its expense. Without that, I do not see any obligation on the council to move in the matter; nor can I say that, till that is done, they would or could have in their hands any funds legally applicable to such a purpose.

It is true that by the 43rd clause of the District Council Act, the court house is vested in the district council. That can only make them as it were the owners of the building; but it is not from the ownership of the property that the common law duty arises, when it does arise, but from the occupation.

We cannot, I think, hold the district council to be the actual exclusive occupants of the court house. It is a building used for public purposes, with some of which they have no connection, and placed by an express by-law in the care of the district surveyor.

In the case of *The Corporation of Lyme Regis* v. *Henley* (1 Bing. N. C. 235), in error, the principles of such an action as the present were much discussed. It was held there to lie against the corporation, because the duty to repair arose from an express condition in their charter; a ground which cannot apply here; but it is there stated to

be a test of the individual's right to maintain such an action that he had sustained some positive damage, and that the obligation to repair was matter of so general and public concern, that an indictment would lie for not repairing.

According to that test, it would be impossible to support this action; for it cannot be maintained that the district council could be indicted for not passing a by-law for repairing a public building, which building is by law placed under the care of a distinct public officer, who had not reported to them the necessity of such repair, or at least is not shown to have done so. In the same case of Henley and the Corporation of Lyme Regis, when it was before the Common Pleas, Best, C. J. (5 Bing. 108), seemed to rest the right of action in such a case, when it is brought against a public officer upon the fact of his receiving a compensation for discharging the duty, which, if it be a true and universal test, would introduce a new question here.

And the case in 6 Clk. & Finelley, 894, would seem to interpose a new difficulty, on the ground that the district council having no funds except such as have been raised for specific purposes, and having no authority to raise money to pay a verdict against them, cannot be held liable to a pecuniary claim of this nature.

We are of opinion, however, that the rule for arresting judgment should be made absolute on the specific ground that the defendants are only charged in this action as having the court house under their control, and by law bound to keep it in repair; whereas we are compelled to take notice that the district council have not the court house under their control, in the sense here intended, but it is placed here by law under the care of the district surveyor, upon whom the responsibility is in the first place thrown of reporting and estimating for necessary repairs, when, and not before, it becomes the duty of the council to pass a by-law for the purpose. But that they would be liable to an action by an individual for not passing such a by-law, is not at present my opinion.

If this action could be supported, then I do not see why an action should not equally lie against the district council in a multitude of other cases, in which I am confident it was never imagined they could be made liable. For instance, under the recent statute 12 Vic. ch. 81, sec. 31, they have power to pass by-laws "making regulations as to pits, precipices and deep waters, or other places dangerous to travellers;" and it might as well be contended that every person who meets with an accident, because a highway in any part of the district is in an unsafe state, has a right of action against this legislative body, because they

did not, at their peril, notice it, although there is an officer whose special duty it is to report to them when any work of the kind is required; and although they are unable to take any steps without his report, and can do nothing at any rate but pass a by-law, and are limited as to the amount of money they can raise, and have no means of paying any damages that may be recovered against them.

Per Cur.—Rule absolute to arrest the judgment.

MARMORA FOUNDRY COMPANY v. MURNEY.

Demurrer.

Sufficiency of declaration for calls under the statute 1 Wm. IV. chap. 12.

(C. P., T. T., 13 Vic.)

Declaration dated 22nd April, 1850.

Writ issued 10th April, 1850.

Declaration in debt for £75. The first count of the declaration states, that before the election of directors, and before the commencement of the suit—to wit, on the 1st November, 1848—the defendant subscribed for, and became, and was, and then was the owner and holder of divers (to wit, 20) shares of the capital stock of the Marmora Foundry Company, each share being of the value of £12 10s., and in all £250., and which became due and payable to the plaintiffs, as follows: that is to say, ten per cent. on each of the said shares, immediately after the stockholders of the said company should elect the number of directors after mentioned, and the remainder by instalments of not more than ten per cent. upon the amount of each share, at such periods as the president and directors of the said company should from time to time direct and appoint; provided that none of the said last mentioned instalments should be called for by the plaintiffs in less than forty days after public notice should have been given of such call in the *Upper Canada Gazette*, and in some two or more newspapers published in the then Midland District; that afterwards—to wit, on the 18th of November, 1848—the sum of £20,000 of the capital stock being then subscribed for, the subscribers called a meeting at the court house in Belleville, on the 27th of December, 1848, for electing the number of directors of the said company above mentioned, and of which notice was given and published in the *Upper Canada Gazette*, and in two newspapers printed in the Midland District, and in two newspapers printed in the Victoria District, on the 18th November, 1848, thirty days previous to such meeting; that afterwards—to wit, on the 27th December—a meeting of the

stockholders was held at the place appointed, who then and there elected five directors of the said Company of the said stockholders eligible, &c., whereupon the said 10 per cent. first above mentioned on each of the said twenty shares—to wit, 25s. on each share, in all, £25., parcel of the said £75.—became due and payable from defendant to plaintiffs, whereby an action had accrued, &c.

The 2nd count of the declaration further states, that after the said subscription for the said stock, and after the election of directors as above stated, and before the commencement of this suit, and while defendant continued such stockholder in the said company, and so liable upon the said stock as first above mentioned—to wit, on the 20th of April, 1849—the president and directors of the said company did, according to the powers in them vested by the act incorporating the plaintiffs, and in due form according to law, direct and appoint that an instalment of 10 per cent. upon each share of the said stock so held and owned by the defendant as aforesaid should become due and payable from the defendant to the plaintiffs on the 15th June then next, at the office of the Bank of Montreal, in Belleville aforesaid; of which call public notice, according to law and to the requirements of the said act of incorporation, was duly given by the plaintiffs—to wit, on the 1st of May in the year last aforesaid—in the *Upper Canada Gazette*, and also in the *Chronicle and News*, and in the *British Whig*, two newspapers published in the then Midland District, and in the *Intelligencer* and *Victoria Chronicle*, two newspapers published in the then Victoria District—to wit, forty days before the day and period—upon which the said instalment was so appointed and directed to be paid as aforesaid, and thereupon and by force of the statute in that behalf, the said instalment, amounting—to wit, to the sum of £1 5s., on each share, in all to £25.—(parcel of the said sum of £75 above demanded,) became due and payable from the defendant to the plaintiffs—whereby an action had accrued to the plaintiff's to demand of and from the defendant the said sum of £25., parcel, &c.

3rd count of the declaration, similar to the 2nd count, for another call of 10 per cent., alleged to have been made on the 25th September, 1849, to be paid on the 10th of November then next, at the place mentioned in 2nd count, and duly advertised in the newspapers in the said 2nd count mentioned, being similar to the 2nd count, and stating in addition, that although the said sum of £25, in the said second and last count mentioned, were respectively due and payable before the commencement of this suit, yet defendant, although requested, hath not

paid the said sum of £75, above demanded, or any part thereof, to the plaintiffs damage of £50, &c.

Demurrer to 2nd and 3rd counts—similar grounds being separately assigned to each, viz :

1st and 2nd grounds of demurrer, abandoned on argument.

3rd. That in the said counts the plaintiffs have attempted to set out the requirements of the act 1 Wm. IV., ch. 12, and have only set out, or stated, the subscription of the stock, and calling a meeting to elect directors; but have not set out all that is required by said act, prior to the subscription for stock and the election of directors, such as the opening of the books, under the authority of a majority of the petitioners mentioned in such act, and the places where, and times when, such books were opened, and under whose direction or authority—or that books were opened for the subscription of stock under the said act, under the authority of the said petitioners, by any person or persons designated, named or appointed by them, or a majority of them to open such books.

4th. That no sufficient cause of action is shown by the said 2nd (and 2rd) counts, to enable the plaintiffs to recover against the said defendant under the said act, as the said act does not expressly contain any provision authorising the said company to sue without setting out the special matter or requirements contained therein, necessary to sustain the cause of action in the said 2nd (and 3rd) counts.

5th. That it is not stated that the money therein mentioned and sought to be recovered by the plaintiffs from the defendant, is sued for or become due and payable under and by virtue of the said act, nor is the said act sufficiently set forth to enable the plaintiffs to recover.

6th. That the plaintiffs' not having set forth the requirements of the act antecedent to the subscription of stock and election of directors, before the said company could be legally formed, places defendant in such a position that he cannot by pleading controvert or deny the legal formation of the said company, as such facts are not therein (*i. e.*, in the 2nd and 3rd count) alleged and set forth.

7th, That it is not shown that the defendant is a stockholder in the said Marmora Foundry Company, and therefore cannot be sued by the said company in any matter respecting the stock or effects of the said company.

8th. That in said counts it is alleged that the said instalments became due and payable from the defendant to the plaintiffs on the days mentioned, at the office of the Montreal Bank at Belleville, and it is not

averred or shown that the said instalments were not paid at such office at the times appointed, &c.

Plaintiffs join in demurrer.

Eccles, in support of the demurrer, contended—

1st. That the inducement to the 1st. count cannot be referred to, in aid of the 2nd and 3rd counts, and that not being a general inducement to the whole declaration, the 2nd and 3rd counts do not sufficiently refer thereto to connect it with them, even if that were admissible, and that they are therefore imperfect.

2nd. That the previous proceedings required by the act, constituted conditions precedent to the plaintiff's right to sue, and should have been set out; that the act does not (like many others) enable the plaintiff's to declare generally, therefore the declaration should have been special, and should aver the performance of all the conditions specially —such as opening the books of subscription within two months, &c.; that notice of the appointment of directors should have been alleged, and it should further have averred that there are directors at present, which it has not done; also, that Hetherington had conveyed the Marmora property to the plaintiffs, and that he joined in forming the company, being one of the three petitioners to parliament named in the recital of the act.

Hagarty, for the plaintiffs, objected that several of the latter objections were not suggested as grounds of demurrer, and could not now be raised for the first time; that defendant being a stockholder, was bound to take notice of the proceedings, and that the two counts demurred to, contained sufficient statements to support the action, the principal points to be stated being, that the defendant was a shareholder, and that the calls were made, for, if so, the defendant was liable; that it is shown that the corporation went into operation as a company, under the statute, and and that were made and published as the act required, and of which the defendant thereby had notice, such calls being made by the directors *de facto*, and that it was not essential to show or aver them to have been such *de jure*, although the plaintiffs are not empowered to declare generally, enough is stated, under any rule of pleading, to show compliance with all material and essential steps that can be regarded as conditional, and not merely directory provisions.—6 U. C. R. 567.

MACAULAY, C. J.—The attention of the court, since the late rules—H. T. 13 Vic. No. 27, p. 9,—must be confined to the grounds of demurrer regularly stated—that is, to those specially assigned on the face of the demurrer. The first and second grounds of demurrer having been abandoned, the first point is whether the 2nd and 3rd counts show

a sufficient compliance with the statute of incorporation; and as it contains no special provisions respecting the form of declaring, it is necessary to distinguish carefully between what is merely directory therein, and that which is strictly conditional. The statute 1 Wm. IV., ch. 12, after providing in section 1 for the formation of the company, enacts in section 3 that books of subscription shall be opened within two months after the passing of the act; where, when and by such person or persons, and under such regulations as the majority of the petitioners shall direct and appoint. This I consider a provisional and directory, and not a conditional clause, for I do not think it necessary to the scope and spirit of the act to hold that the company could never be formed unless books were opened within the period specified. The non-election of directors would not dissolve the company when once formed (by sec. 9), and the not opening of subscription books within two months, should not forever preclude its formation.

The opening of books was a necessary preliminary to their being subscribers for stock therein, but the duties of the three petitioners on that subject were in a great measure, if not purely, ministerial. It was not required of them, that they should become stockholders or subscribers for shares, or acquire any personal interest in the company, merely that books should be opened under their direction. The first steps towards the organization of the company were entrusted to them, the original projectors of, and applicants therefor, and the interest of Hetherington in the Marmora iron works, as recited, accounts for the use made of his name. The more general objection is, that it is not averred that any books were ever opened, or that any were opened under the petitioners or a majority of them, or in what books, or in what manner the defendant subscribed or became a subscriber for stock; it is however, averred that he subscribed for, and became, and was, and still is the owner and holder of divers shares of the capital stock of the company; and the meaning of the word "subscribed," as used in the statute, is explained by the case of the *Thames Tunnel Company* v. *Shelden* (6 B. & C. 341; 9 D. & R. 278), and three railway cases (2 B. 649). It is not necessary for the plaintiffs to aver more than they have done—namely, that the defendant subscribed for and became the holder and owner of shares, &c. The declaration in 4 U. Canada R. 309, is framed much in the same form as the present. The opening of books is a matter of evidence, rather than of substantive averment. It is alleged that the defendant subscribed and became the owner and holder of shares—this (if sufficiently averred) is admitted by the demurrer. Had the defendant denied by plea that he had subscribed, or was the owner or holder

of shares, the onus would be upon the plaintiffs to prove the affirmative, and when it was shewn in evidence how the defendant had become a subscriber, the question of its validity as binding upon him, and proving him to be a shareholder, would arise. In my opinion, the averment in the declaration is sufficient. If books of subscription had not been opened, he could not have subscribed; the material fact to be alleged is, that he did subscribe, and became the owner and holder of stock; in what way he subscribed is matter of evidence. The condition precedent to his liability for calls is, that he should have subscribed for and become the owner and holder of stock; if he did, as is alleged, he is liable accordingly.

The only notice of calls required to be given is that prescribed by the statute. I find no authority requiring notice of the appointment of directors to be given to each stockholder, or for the averment that there were directors in office when the action was brought; the organization of the company being shewn, it is to be presumed that it continues until the contrary is shewn. On reference to the dates, it will be seen that the call stated in the second count was made during the time of the directors alleged to have been elected in December, 1848. The call mentioned in the third count was at a period subsequent to the first Monday in August, 1849; but it is averred to have been made by the president and directors of the company, (which if necessary to be averred at all) is a sufficient averment of there being directors then; and the action having been brought during the time of such directors, it sufficiently appears that there were directors when the action was instituted, at all events that is to be presumed,—and if in fact there were none, it should be shown by the defendant.

It is not noted as a ground of demurrer that Hetherington should have been shown to have conveyed to the plaintiffs, nor is it necessary as a condition precedent to their right to sue for calls; the acquisition of Hetherington's estate therein is not indispensably necessary to their operations—a less interest may suffice.

The inducement to the first count may be properly incorporated in the second and third, by reference thereto, as made—see 4 M. & W. 243, 579,

Turning to the causes of special demurrer assigned, it appears:—

1. That it is not necessary to aver that books were opened by persons under the authority of a majority of the petitioners—that being matter of evidence, should the defendant deny his being a shareholder of the company under the statute.

2. That all necessary conditions are sufficiently averred.

3. That it is sufficiently averred that the monies sued for became due and payable under the act, and that the act is sufficiently set forth to enable the plaintiffs to recover.

4. That the declaration is sufficient to enable the defendant to controvert the formation of the company, or to traverse any fact material to his liability as a shareholder.

6. That it is expressly averred that the defendant is a stockholder, and sufficiently shown for the purposes of this action.

5. The general allegation of non-payment is sufficient. If the defendant did not pay at all, he did not pay at the time and place appointed, and a denial of payment generally includes a denial of payment at such time and place.

Looking at the statute, the proceedings and the defendant's subscription under it, as constituting a contract between the plaintiffs and defendant, the conditions on which his liability to pay was to arise were the election of directors after £20,000 should have been subscribed, and the due making and publication of calls. These conditions are alleged to have been performed: the preliminary steps previous to the defendant's subscribing do not seem to be conditions precedent to his liability, any further than they are *prima facie* at least impliedly admitted by his own act in becoming a subscriber, although as matter of defence it may be open to him to plead that owing to some omissions or irregularities in the previous proceedings he did not, as a subscriber for shares, acquire the rights and privileges of a shareholder, and did not, therefore, incur the liabilities as such to the plaintiffs. This is not shewn; and as respects conditions essential to be shown by the plaintiffs, I think the declaration contains all averments necessary to the maintenance of the action.

McLEAN, J.—In the act of incorporation 1 Wm. IV. ch. 2, the plaintiffs are authorised and empowered to sue, and are made liable to be sued, in all courts and places whatsoever, in all manner of actions, suits, complaints, matters and causes; and in the case of the plaintiffs against Ponton in this court, it was decided that they could sustain an action for the first instalment on stock subscribed, and payable, under the statute, immediately after the appointment of directors.

In this case, the plaintiffs seek to recover this first instalment, and also the amount of ten per cent., being two calls made by the directors under the provisions of the act of incorporation.

The first count for the instalment, which became payable, according to the statute, immediately on the election of directors, and for which a call was therefore unnecessary, sets out the various proceedings which

took place in order to establish the company according to the requirements of the statute, and that count is not demurred to. The second and third counts, which are for calls made by the directors, do not contain any statement of such proceedings; but they allege that after the subscription of stock by the defendant, as *first above* mentioned, and after the election of directors as above mentioned, and before the commencement of this suit, and while the defendant continued to be such stockholder, and so liable upon the said stock, as *first* above mentioned, the president and directors of the Marmora Foundry company did, according to the powers in them vested by the act of incorporation, and in due form according to law, direct and appoint that an instalment of ten per cent. on each share so held and owned by the defendant, *as aforesaid*, should become due and payable at certain specified periods, at the office of the Bank of Montreal, at Belleville; and each of the counts contains an averment, the due notice of the calls was published in certain specified newspapers in the Midland District and in the district of Victoria, forty days before the days and periods upon which the respective instalments mentioned in these counts were appointed and directed to be paid; and thereupon, and by virtue of the statute in that behalf made and provided, the several instalments upon the shares of the stock held by the defendant as aforesaid, amounting to a certain sum upon each call, became due and payable from the defendant to the plaintiffs, whereby an action hath accrued, &c. In the third count there is at the conclusion an averment, applying to the second and third counts, in these words:—"And although the said other sum of twenty-five pounds, further parcel, &c., in the second count mentioned, and the said sum of twenty-five pounds, residue, &c., in the last count mentioned, were respectively due and payable before the time of the commencement of this suit; yet the defendant, although often requested so to do, hath not paid the said sum of £75 above demanded, or any part thereof, to the plaintiffs' damage of £50.

To these counts the defendant demurs, and assigns for cause of demurrer those above mentioned in the judgment of the Chief Justice of this court.

The first and second grounds of demurrer were abandoned on the argument, but the objections to the third count are precisely the same as those to the second. With respect to the second ground—that plaintiffs do not in the second count set out the provisions of the act to be complied with before the corporation could by law exist—it appears to me not to be entitled to any weight. In the first count, the formation of the company and all the preliminary proceedings for that object, are

set out, and the subscription of the necessary amount of stock to entitle the stockholders to elect directors, in order that the company might go into operation; and the facts of such election, after due notice, are fully set forth, as well as the defendant's subscription for a certain number of shares of that stock. The second count refers to the first, and has a somewhat peculiar commencement, making it apparently a continuation of the first count. Instead of commencing in the most usual mode, "And whereas," &c., it commences with the words, "And the plaintiffs further say, that after the said subscription of the said stock by the defendant, as first above mentioned," &c.,—thus coupling the statements in the first count with the second. But if it were otherwise, and if the formation, pursuant to the terms of the statute (4 M. & G. 552), the corporation had not been contained in the first count, I incline to think the count would still have been good in commencing with the defendant's subscription for stock—leaving it to the defendant, in his pleas, to deny any particular facts necessary for the formation of the company. The defendant, though he might have subscribed for stock, could not by law be compelled to pay it until the sum of £20,000 required to be subscribed was actually subscribed for, and until the election of directors; and when sued, he might plead that the amount of £20,000 had not been subscribed; and on proof of that fact, he would be entitled to a verdict, as the election of directors would in such a case fall to the ground, and with it the existence of the company: or he might plead, if the fact were so, that there had been no election of directors, as, till such election, the company could not be organized, and there could be no one entitled to receive the instalments. In the argument, I understood it to be contended by the plaintiff that the defendant was estopped from denying the existence of the company from the fact of his having subscribed for a certain number of shares of its stock; but as the company could not be organized until a certain amount of stock was subscribed, the mere circumstance of the defendant subscribing stock for a company which might never come into existence, could not estop him from denying that such company had come into existence. His liability must depend upon the terms of the statute being complied with by the subscription of the necessary amount of stock, and the subsequent election of directors; and of course the defendant must be at all times entitled to controvert these facts, whether alleged in the declaration or not. He is, however, I think, estoped from denying that the subscription books were opened at the proper time, and under the authority of the proper parties, even if the denial of these matters, which are directed by statute, could avail him. These observations apply to the third and

fourth grounds of objection stated by the defendant, and shew, in my opinion, that they are as little entitled to prevail as those which precede them.

The fifth objection is not founded in fact. It alleges that there is no statement that the money sought to be recovered became due and payable under and by virtue of the act of incorporation: there is an express averment in each of the counts demurred to, that "thereupon and by force and virtue of the statute in that behalf made and provided, the several instalments became due and payable from the defendant to the plaintiffs, whereby an action hath accrued, &c.

As to the sixth ground of demurrer assigned by defendant, it is alleged in the first count that defendant subscribed for certain shares of stock of the company; and the statements in that count being particularly referred to, and engrafted as it were in the second and third counts, the defendant is sufficiently shewn to have become a stockholder, and liable to be sued for his instalments. The last objection—that it is not alleged that the instalments were not paid when due, at the office of the Bank of Montreal at Belleville, where the calls were required to be paid—appears also to be unfounded. At the conclusion of the declaration there is an express averment that the defendant, though often requested so to do, hath not paid the said sum of £75 demanded, or any part thereof. This averment is general, and alleges that no part of the sum demanded has been paid—it is a denial that the amount has been paid at the Bank of Montreal at Belleville, or anywhere else, and I think quite sufficient.

SULLIVAN, J., concurred.

Judgment on all the grounds of special demurrer must be for the plaintiffs.

JOY V. MCKINN AND GUESS.

That the defendants' proceeding to straighten a highway, acting as trustees of the said highway, under a By-Law of the Municipal Council, passed in 1848, and under proceedings in General Quarter Sessions in 1823, and in so doing encroaching on the plaintiff's possession, are not entitled to the protection of the statute 50 Geo. III., chap. 1. Nor can they give the special matter in evidence under the general issue.

(C. P., T. T., 13 Vic.)

Case for injury to the plaintiff's reversion, being a close of plaintiff's in the township of Kingston, in the possession of John Black as tenant thereof, to the plaintiffs; by cutting, digging, ploughing up, and subverting the earth and soil, and cutting down apple trees and other fruit

trees, and prostrating and destroying fences, &c., and making a public or common road in, upon, over and through the said close, &c.

Plea 1st. (separately) Not guilty by statute.

Plea 2nd. (separately) That the said close was not in the possession of the said Black as tenant to the plaintiffs, nor did the reversion thereof belong to the said plaintiff at the said time when, &c, and as in the declaration alleged, &c.

This action was tried before Mr. Justice Draper, at the Spring Assizes, 1850, for the united counties of Frontenac, Lennox and Addington. It appeared in evidence that the plaintiff was owner of an acre of land, on which was a house and garden and fruit trees, being part of lot number 16, in the third concession of the township of Kingston, of which Black was at the time, when, &c., tenant for a year, at the rent of £4 10s. That in the original survey, an allowance for road was left between lots numbers 16 and 17, but not between lots numbers 15 and 16; that being more convenient, the proprietors of numbers 15 and 16, about forty years ago, consented to a public road of forty feet in width, being opened between lots numbers 15 and 16; twenty feet being taken off each lot for that purpose. The course of this dedicated right of way, seems not to have been in a right line. It was said by a deputy-surveyor, a witness for defendants, that although the original intention was, that each lot should furnish half the road, yet it was departed from under the impression that as the government allowance joined number 16 on the east, (15 being on the west of number 16) the whole of the new road should be taken off number 16 on the west, in the belief that the proprietor thereof would obtain the right to such government allowance on the east. However this might have been, a road was opened partly on each lot—statute labor had been done upon it—it had been used as a public road for forty years—and the plaintiff's fence, or the fence on the tract owned by him, had during all that time been placed on the edge of the old road. This road, in the line, and of the width, originally opened and adopted, seems to have been so used until the year 1823. On the 20th June, 1822, an application in writing was addressed to the surveyor of highways for the County of Frontenac, signed by nineteen freeholders of the said county, including the plaintiff, and setting forth that they considered it necessary for the convenience of Her Majesty's subjects, that the road between lots 15 and 16. in the third concession of Kingston, should be straightened, and that they wished him to examine the premises, and to report the same to the Quarter Sessions of the Peace, to be holden at Kingston, within and for the said county.

By a report of the said surveyor of highways, dated Kingston, 6th of

April, 1823, to the justices of the Court of General Quarter Sessions, to be holden at Kingston in and for the Midland District on Tuesday the 3rd of April, 1823, reciting the foregoing application, he reported that having examined the premises, he conceived that the allowance for road being as well adapted for the purposes of a highway as that which was then occupied, it would be proper to straighten the said road, although not so much on account of shortening the road, or benefiting the public travel, as that of interfering with private property and misplacing the statute labour. At the foot of this report is subscribed,

"Allowed. THOMAS MARKLAND, *Chairman.*"

Indorsed thereon was a certificate of the surveyor of highways, dated April 6th, 1823, that pursuant to the statute, he had caused copies of the report to be affixed at two public places, mentioned, &c.

Also, "April, 1823: Road report relative to a road between 15 and 16, in 3rd concession, Kingston. Confirmed. Entered." The latter in the handwriting of the then Clerk of the Peace. Also, "Order given to Jethro Jackson, December 3rd, 1823.

J. NICHOLLS, jr., D.C.P."

Mr. Nicholls, who is now Clerk of the Peace, said he must have issued the order; but no order was produced or accounted for, or the contents shewn, or whether addressed to Jackson, or framed in general terms to straighten the road.

Nothing seems to have been done upon the foregoing application, report, confirmation or order; but by a by-law of the Midland District Municipal Council, passed the 12th June, 1848, for raising a sum of £15,000 for making, improving and maintaining certain roads in the said district (No. 76), it was enacted that the said loan, or such part thereof as should be raised, should be appropriated for the making, improving and maintaining certain specified roads; among others (No. 4), a road extending about nine miles from Waterloo, to intersect the lines between lots Nos. 10 and 11, 7 concession of Kingston, &c., on the old line of road, passing Counter's and Merril's taverns; which road, it was admitted included the road in question between 15 and 16 in the third concession aforesaid. It was also admitted that the defendants were, by a by-law of the same council, appointed trustees for the aforesaid road.

A surveyor was employed to run the line between 15 and 16 in 1821; in 1824 to survey the south half of 16—when he laid out 40 feet for a road on No. 16; and in 1827 to lay off the acre owned by the plaintiff; but the travelled road was then 40 feet west of the line he marked as the boundary of the acre, and the land was actually inclosed up to such

road. In this state it seems to have remained until the defendants, acting under the foregoing by-laws in laying out monies on this road, and on the proceedings in general quarter sessions in 1823, as authorising them so to do, proceeded in May or June 1849 to straighten the line of the road, and in so doing encroached upon the possession of the plaintiff's tenant (holding under a lease for a year from March 1849), along the whole front of his lot, the extent of which was said by some to be nine, and by others to be forty feet; they also pulled up the fence enclosing the lot—pulled up some apple trees—subverted the soil, and converted that part of the plaintiff's close into a public road which constituted the injury to his reversion for which the action was brought.

It was, on the facts in evidence, contended that the defendants were entitled to give the special matter in evidence under the general issue, and to the protection of the statute 50 Geo. III., ch. 1, under which they acted *bona fide*—and also, that the action was too late, not having been brought within three calendar months after the act done—and that they were justified in what they did by the proceedings and order of the quarter sessions in 1823. The learned judge rejected such defence, and left it to the jury, saying the by-law would as well or better apply to the old travelled road, rather than to the line of road which the order of the quarter sessions contemplated or professed to confirm.

The jury found for the plaintiff, with £20 damages.

In the following term a rule was obtained, calling on the plaintiff to shew cause why such verdict should not be set aside and entered for the defendants, pursuant to leave reserved at the trial—or a new trial be had between the parties, the verdict being contrary to law and evidence; for misdirection, excessive damages, surprise, and on affidavits filed. The affidavits relate principally to the value of the property, and the injury committed to the plaintiff's reversion, in order to show that £20 far exceeds the actual amount of damages sustained.

Cause was shown for the plaintiffs during the same term.

The defendants' counsel relied principally on the ground, that in the leave reserved to move—it being left to the court to draw all proper conclusions from the evidence, as a jury might do—it appeared that the defendants were public officers acting *bona fide* as such in the supposed execution of a legal authority, under the order of the sessions, to widen or straighten the road, and entitled to the protection of the statute; and if so, the action was too late: that the proceedings in the quarter sessions and by-law justified them; referring to statute 50 Geo. III., ch. 1, sec. 34, and statute 4 & 5 Vic., ch. 10, secs. 45 & 51, which last confirmed the order of the quarter sessions; and citing 1 B. & Ad. 391;

10 B. & C. 277; 8 B. & Ad. 330; 5 East. 115; 3 M. & S. 580; 9 B. & C. 806; 2 U. C. R. 206; 3 Y. & J. 60; that *Rex* v. *Sanderson*, in U. C. Q. B R. was an indictment, and although it may show the order of the sessions, was imperfect, in not defining the width and the exact line of the proposed straight road; it did not apply against the defendants' right to the protection of the act, as having acted *bona fide* under it. He also contended that the damages were excessive.

For the plaintiffs it was contended, that the defence relied upon should have been specially pleaded; that the defendants had no authority to deviate from the old line of road; that the proceedings in the sessions were void for uncertainty, and insufficient—and if not, that they were absolutely null and void from lapse of years, not having been acted upon within twenty years; that the object was to avoid interfering with private property, the very thing of which the plaintiffs complained; that the case of *Rex* v. *Sanderson* shows the order of sessions void; that the defendants acted without any authority and were entitled to no protection; that there was no misdirection, and that the damages were not excessive.

MACAULAY, C. J.—The statute 33 Geo. III., ch. 2, sec. 5, authorised the township meeting to choose and nominate overseers of highways, to oversee and perform such things as should be directed by any act to be passed touching or concerning the highways and roads in the province.

The statute 50 Geo. III., ch. 1, authorised the justices of the peace in quarter sessions to appoint surveyors of highways, and prescribed their duties. Section 3 enacted, that upon application in writing to such surveyor by twelve freeholders of any county, stating that any highway or road in their neighbourhood "now in use" was inconvenient, and might be altered, &c.; or that it was necessary to open a new road or highway, he should examine the same, and report thereon in writing to the justices at their next ensuing quarter sessions, describing particularly the alteration intended to be made, or new highway or road to be opened, giving at the same time public notice, as therein provided; and if no opposition should be made to such report, the justices were required to confirm the same, and to direct such alteration to be made, or such new highway or road to be opened accordingly.

The rule by which it is to be determined whether a defendant is entitled to the protection of the act 50 Geo. III., ch. 1, will be found in the following cases: 10 B. & C. 277; 3 M. & S. 580; 1 B. & A. 227; 6 B. & C. 351; 1 B. & A. 227; 3 B. & A. 330; 2 B. & B. 619; 6 B. & C. 351; 9 B. & C. 809; 4 B. N. S. 41; 9 A. & E. 654; 4 A. & E. 774; 6 A. & E. 661; 9 M. & W. 746; 15 M. & W. 346; 10 A.

& E. 582; 3 Q. B. 997; 15 M. & W. 357; 16 M. & W. 77; 10 Q. B. 144.

The defendants claimed to have acted under the act 50 Geo. III. ch. 1. There is no reason to doubt that the defendants acted *bona fide*, at least thus far, that being appointed trustees to expend money on this road, they conceived themselves empowered by law to make it straight, and in doing what they did, acted *bona fide* in their character of trustees. The act authorised and required overseers of highways to obey certain orders of the justices acting as commissioners of roads, and clothed them with certain protection. From the passing of the 33 Geo. III., ch. 2, until the passing of the 12 Vic., ch. 81, the appointment of such overseers rested with the annual township meetings; that is, until and at the time the by-law was passed, and when the defendants acted under it. The presumption therefore must be, that, irrespective of the by-law, there were regularly appointed overseers, within the division of one of whom the road in question came, but the expenditure of the money under the by-law was not entrusted to the said overseers. The defendants were specially appointed for that special purpose—no general or implied duty, as overseers of highways, vested in them; they therefore did not fill the character contemplated in the statute; but if they had, the statute on the subject of overseers had been changed between the justices' order in 1823 and the passing of the by-law in 1848. The statute 33 Geo. III., ch. 2, and 50 Geo. III., ch. 1, sec. 11, 14 and 33, were repealed by 5 Wm. IV., ch. 8, in 1835, and 1 Vic., ch. 21, in 1838; and if Jackson, to whom such order was delivered in 1823, was overseer at the time, and as such was directed to make necessary alterations in the road, it can only be regarded as a special order to him personally. The act directing the trustees to order the road to be opened, and their having so ordered, would not constitute it a continuing order to all future overseers—certainly not after the authority contained in 50 Geo. III., ch. 1, to warrant the justices ordering the overseers what work to do, had ceased. From the year 1835, the overseers acted under 5 Wm. IV. ch. 8, and 1 Vic., ch. 21—not 50 Geo. III., ch. 1. For anything done by overseers after 5 Wm. IV., ch. 8, was passed, no protection could have been derived under 50 Geo. III., ch. 1, sec. 33, which as to overseers was repealed: the defendants of course could not be protected by a law that had so long ceased. The act 4 & 5 Vic., ch. 10, transferred to the municipal councils the powers previously possessed by the justices, and they might thereupon issue orders to overseers of highways—but under the act 1 Vic., ch. 21, not under the act 50 Geo. III., ch. 1. The defendants consequently could only

be acting under the last mentioned act, under the impression that as *quasi* overseers, the proceedings and order of the sessions in 1823, contined in force, and entitled and required them to execute such order.

The proceedings on the files of the court of course subsisted, and were transferred to the possession of the council, and were open to be inspected by them. They knew then that in 1823 the road had been ordered to be made straight; but although the act 50 Geo. III., ch. 1, directed an order to issue for its opening, and may have justified any one in doing it, the order itself could only be imperative upon an overseer or the overseers to whom directed and delivered, subsequent overseers would not be indictable for disobedience of it, which is a test; and the defendants, having no reasonable ground to suppose they were the overseers or that it was directed to, or imperative upon them, could only have supposed they had a general authority in law to make the road straight, in expending public monies thereon. They could not have reasonably supposed it was incumbent upon them or their duty (however within their legal authority, as entitled to abate a nuisance or remove obstructions from a highway,) to widen or straighten the road, merely by reason of their appointment under the by-law, which spoke only of the old line of road. They would not be entitled to the protection of sec. 33, if still in force, not being overseers or acting under their directions; and if not, or if they had no reasonable ground to suppose they were, how could they be acting in pursuance of the act, so as to come within sec. 34? This section was intended to apply to all others, as well as overseers acting under it, and after the repeal of those clauses relating to overseers, overseers appointed under subsequent acts could not claim protection, as acting under that act. It appears to me that the defendants are not entitled to the benefit of the 34th section, because they were not overseers, and were not in any capacity acting in pursuance of the act,—they were acting in a different capacity, and under and in pursuance of other acts and by-laws. The justices who issued the order in 1823 would not be liable to answer for what they did, as being done under their orders, which is another test; and sec. 33, if in force, would not have discharged the defendants from this action. If the justices would be liable for the defendant's acts, of course they would be entitled to the protection of the 34th section of the act. The case is reduced therefore to the consideration whether the proceedings in 1823, which were under and in pursuance of the act, have in themselves, or from any aid derived from 4 & 5 Vic., ch. 10, the effect of making the straight line adopted thenceforth a part of the highway; and, in short, the effect of substituting a straight for the previously winding line of road, so that any

person working on the highway at any future time might legally alter the old road and adapt it to the new line, and it is under this impression the defendants seem to have acted. It has not, however, been contended that the proceedings are valid or not void for uncertainty, according to the case of *Rex* v. *Sanderson*; and if they were valid, so as to justify the defendants in opening the new or straight line of road, after the lapse of so many years, as being vested in the crown in 1823, under sec. 35, and so public property, still such justification is not pleaded or admissible in evidence under the general issue. Admitting that in 1823 the old road was regularly altered and the new line made a public right of way under the act of 50 Geo. III., ch. 1, and that any subsequent overseers or pathmasters could justify by the opening of it accordingly, still their doing so would not be a proceeding done in pursuance of the act, but under the authority of the common law, which authorised the removal of obstructions to a public highway, as being an abatement of a public nuisance. To be acting in pursuance of the act, the party must do some act which it required him to do, or which he was ordered to do under it; or, at least, he must have had reasonable grounds to suppose he was so required or ordered; without this he could not claim the benefit of its protective clauses, and I think no such ground existed in the present instance. I do not doubt the defendants thought the new line was constituted a public right of way in 1823, and so continued in 1848, and that they were in law justified in opening it, and did so open it *bona fide*; but I do not think they had any reasonable ground to suppose, or did suppose, that they were acting in pursuance of the act, or of the justices' order, as binding upon them, and rendering it incumbent on them to make such alteration, in expending the monies directed to be laid out under the by-law. The justices' order (otherwise than as a material ingredient in rendering the new line of road a part of the highway) had long been obsolete. It had never been acted upon. Jackson, who would have been entitled to the protection of the statute had he acted *bona fide*, although illegally, did nothing under the order. That part of the plaintiffs' land which was in 1823 intended to be embraced in making the road straight had never been disturbed. The owners had not been dispossessed. It was never taken into occupation and used as a public road. In fact the whole proceedings laid dormant for five-and-twenty years. Under such circumstances, I think it behooved the defendants to have been more cautious, (10 Q. B. 144,) for there is much room to question whether the proceedings in 1823 (if otherwise valid) could have been acted upon in that summary way at so late a period; whether, in short, they had not been abandoned, or vir-

tually ceased to be valid, and the road, as used for the last twenty years previous to 1848, been established as the highway between the lots numbers fifteen and sixteen. And the statute 9 Vic., ch. 8, prohibiting the opening of government allowances, under circumstances resembling the present, afforded a significant caution in relation to the altering or widening private dedications like the one in question, although the title and recital of that act mentioned only government allowances, the enacting clauses speak of allowances for roads generally; and however the word "allowance" may, in construction, be necessarily limited to government allowances, properly so called, still there is room to contend for a more enlarged construction; and certainly the premises in question, if not within the terms, are within the spirit of that enactment. I do not think that the proceedings or order of 1823 received any additional validity or force by the statute 4 & 5 Vic., ch. 10, the provisions of which were evidently intended merely to uphold and continue existing matters as they were, and to transfer certain powers reposing in others to the district councils. The proceedings of the defendants must be regarded irrespective of the statute 4 & 5 Vic., ch. 10, in determining their legal validity and effect. The defendants being liable to the action, I do not think a new trial can be granted on the ground of excessive damages. The defendants, although they acted *bona fide*, nevertheless they did so act incautiously and indiscreetly, and the act was one in itself very offensive to the plaintiff, and from which (in the words of the statute 9 Vic., ch. 8,) great inconvenience might arise.

I think the defendants are not entitled to the protection of the statute 50 Geo. III., ch. 1, sec. 34, even if available are still in force, in relation to the suit and the proceedings under it; that no legal defence or justification, admissible under general issue, is made out, and that the rule should be discharged.

McLEAN J.—In this action the plaintiff recovered a verdict, for £20 damages. The defendants pleaded the general issue *by statute*, and contended at the trial that they were entitled to the protection of the statute 50 Geo. III., ch. 1, sec. 34, which declares that for *anything done in pursuance of that act*, any action or suit shall be commenced and prosecuted within three calendar months of the fact committed, and not afterwards, and that the defendant or defendants, in any such suit, shall and may plead the general issue and give that act and the special matter in evidence at the trial to be had thereupon, and *that the same was done in pursuance and by the authority of that act;* and if the same shall appear to have been so done, or if any such action or suit

shall be brought after the time limited for bringing the same, then the jury shall find for the defendant or defendants, &c. It was urged that the District Council were placed in the position formerly occupied by the justices of the peace, in reference to public highways, and that any person employed under the authority of a District Council, as the defendants were, must be entitled to the protection of the statute to the same extent as if they had been acting under the authority of the justices of the peace. It appeared that a dedication had been made by two adjoining proprietors of land, in the township of Kingston, of twenty feet of ground from each of their lots, 15 and 16, 3rd concession, for the purpose of a public highway, and that the road actually opened and travelled, for many years, did not follow a straight line, but occasionally diverged from it to either side, and that the justices of the peace had by an order, not very precise or formal in its manner of expression, directed the road to be straightened in 1823, but nothing appears ever to have been done under that order. Up to the time of the alleged trespass by the defendants, the road continued to be travelled precisely as before such order was made. The District Council of the Midland District granted a sum of money by a by-law to be laid out in making and improving the *old road*, and the defendants acted as commissioners under that by-law, in carrying out its provisions. They pulled down the fence, and encroached to the extent of forty feet, on lands long in possession of plaintiff and others, cutting down some fruit trees which were growing within the forty feet of ground, over which the defendant made a road, thus leaving the old travelled path, and establishing the whole road on the premises claimed by plaintiff, in order, as it is alleged, to straighten the road as authorised by the order of the justices in general quarter sessions.

By the 45th section of the first Municipal Council Act, 4th and 5th Vic., ch. 10, all rules, orders and regulations of any kind, made before a certain day by the justices of the peace for any district, relative to any rate, assessment, road, public work, matter or thing, by that act placed under the control of the District Council, shall remain in force and effect until it be otherwise ordered by a by-law of the District Council. Under this section, continued in the last act, 12 Vic., ch. 80, the order of the justices of the peace, if otherwise valid, for straightening the road in question, would remain in force, and might be carried into effect under the District Council; but in such a case, if an action were brought like the present against any party employed in straightening and opening the road, it would be necessary to plead the facts

specially, unless such party could be considered as acting under the authority of 50 Geo. III., ch. 1, sec. 34. In pleading it would be necessary to justify, on the ground that the party was employed in removing a nuisance from a public highway. In this case the defendants have not pleaded specially, considering that they were protected by the statute, and that there was no necessity for their so doing. They are therefore without any defence, if they are not entitled to such protection.

By the 39th sec. of the Municipal Act, the District Councils were authorised to make by-laws for the making, maintaining or improving of any new or existing road, street, or other convenient communication and means of transit within the limits of the district, or for the stopping up, altering or diverting any road, street or communication within their limits. In passing a by-law granting a sum of money, and appointing commissioners to expend it in making and improving the *old road*, the District Council could scarcely have supposed that commissioners who derived their authority from the by-law, could be acting in pursuance of the act 50 Geo. III., ch. 1, or that they would need or be entitled to its protection. The commissioners were not in fact acting under the provisions of that statute—they had no public duty under it to perform —their proceedings were wholly under the by-law, and their acts were not in pursuance of any authority. If they were justifiable, as no doubt they were if the ground taken by them actually formed a part of the original dedication for a road, they should have pleaded the facts specially, and in that case would no doubt be entitled to a verdict. As the pleadings now stand, the verdict against the defendants is supported by the evidence, and being for a small amount, it would not be worth while to grant a new trial, with a view to amend the plea, as a new trial could only be granted on payment of costs, which would no doubt far exceed the amount of the verdict, and the matter will still be open to further and uncertain litigation. On these grounds, therefore, I think the rule nisi granted in this case, must be discharged.

SULLIVAN, J.—The principal question raised at the trial and on the argument of this case was, whether the defendants, who were commissioners to expend a sum of money in macadamizing a road under a by-law of the Municipal Council of the late Midland District, and who prostrated and removed the plaintiff's fence, and attached a portion of his close to the road, under pretence of being or supposing that they were authorised to straighten the road by an old order of the quarter sessions, passed in the year 1823, and not shown to have been acted upon up

to the time when the defendants took it upon themselves to straighten the road, were entitled to the protection of the statute 50 Geo. III., ch. 1 —that is to say, whether they were entitled to plead the general issue and to give special matter in evidence, and to have the action brought against them within six calendar months after the cause of action arose. Several objections were taken by the plaintiff's counsel to the order of sessions. I think the order was not sufficient on the face of it, and that probably it was not sufficiently founded in the preliminary proceedings required by the statute; but nevertheless, it seems to me that the path-masters or other persons to whom the order might have been issued, if they *bona fide* and in due season acted under it, would not be prevented by the insufficiency of the order from having the protection of the statute, as to the form of pleading, and as to the time of commencement of suits against them;—the cases 1 B. & Ad. 391, and 10 B. & C. 277, and very numerous other authorities particularly mentiond in the Chief Justice's judgment, shows this very clearly. In the case I have supposed, the persons to whom the order would have been given or addressed would have been acting however illegally under the statute—that is, they would not have acted without the statute, and it would have been in the way of their duty to act; and if, in obeying the order of sessions, they had acted erroneously, they would be entitled to the protection the statute meant, to give to an honest but erroneous exercise of its powers.

The provincial statute 12 Vic., ch. 80, entitled, "an act to repeal the acts now in force in Upper Canada, relative to the establishment of local and municipal authorities and other matters of a like nature," contains, in the schedule of the acts repealed, the statute 50 Geo. III., ch 1, sections one to eleven, and sections thirteen to thirty-four, inclusive, including the section which affords the protection claimed by the defendants. That act was passed 30th May, 1849, and came into force on the 1st of January, 1850, before which day, I take it from the notes of the trial of this case, the injury complained of was committed, but after which the trial was had. The first section contains the following proviso: "That notwithstanding the repeal of the acts and parts of acts hereby repealed, all acts which might have been done and all proceedings which might have been taken or prosecuted, relating to any offences or neglects which may have been committed, or to any matters which shall have happened, &c., before the day on which this act shall come into operation, shall and may still be done and prosecuted," &c.

I am inclined to think that if, in relation to the trespass complained of, which happened before the act 12 Vic., ch. 80, came into force, the defendants would have been entitled to plead the general issue and give special matter in evidence, or to have judgment of nonsuit; if the action were not brought within the time prescribed by the repealed statute, and the same may still be done, notwithstanding the repeal, and the defendants would still be entitled to the protection of the act as claimed by them, in relation to the trespass committed before the repealing act came into force.

But, in the present case, I am unable to trace any connection in the way of duty between the defendants and the order of sessions—it was neither addressed to or delivered to them—they were not the proper officers to execute it. To that order, whether legal or invalid, they were strangers; the utmost that they can say is, that they supposed the road to have been legally opened or straightened by the operation of the order of sessions, and that they trespassed in the abatement of a supposed nuisance. The statute 50 Geo. III., contains nothing to protect strangers in thus acting, or in exercising any supposed right which would belong to them equally with all her Majesty's subjects, if such right existed at all. It was argued, on the part of the defendants, that as the 51st section of the statute 4 & 5 Vic., ch. 10, vested in the municipal councils the powers which were formerly exercised by the justices of the peace, with regard to highways and bridges, that therefore the powers of the municipal councils were identical with those which had belonged to the justices, and that the 50 Geo. III., not being repealed, the officers of the municipalities were entitled to the same protection as had belonged to the persons whose duty it had been to carry into effect the orders of the justices; and that therefore these defendants, being the commissioners of the Municipal Council, and committing the trespass complained of in doing what they supposed to be the performance of their duty, were entitled to the protection which the path-masters would have enjoyed had they in due season carried out the order of the sessions.

But, in the first place, the authority of the council was much larger than that of the justices. The 89th section of 4 & 5 Vic., ch. 10, gives them such full powers, with regard to highways and bridges; that the 51st section of the same act, which purports to transfer to the council the powers of the justices, was altogether unnecessary for the purpose of conferring power, though it may have been necessary for the purpose of taking the power formerly enjoyed by the justices away from them;

and there is nothing in the statute 4 & 5 Vic. ch. 10, which affords the protection given by the statute 50 Geo. III., ch. 1, to the persons acting under it. For example, the powers enjoyed by the justices for the purposes of improvements on roads was limited in each instance to £50. There was no such limit to the powers of the municipality. If we were to hold that the protection of the former act extended to the persons acting under the municipal act, it could only be in cases where the council was acting within the limits of the powers formerly enjoyed by the justices, so that in cases were by-laws were passed by the council, involving expenditure under £50, the officers would be under the protection of the statute 50 Geo. III., but in cases like the present, where the by-laws under which the defendants were acting involved the expenditure of many hundred pounds, there would be no such protection, for the council were doing what the justices were never empowered to do.

And, secondly, the defendants in this case had no order to straighten the road—their duty was to lay out money upon the road.

It was contended in the argument that the order of sessions for the straightening the road in question had the effect *per se* of vesting the soil and freehold of the road in the crown, as it would have done if actually straightened by virtue of the 35th section of 50 Geo. III., ch. 1.

I am of opinion that the section of 50 Geo. III., alluded to, refers to actual alterations and amendments of old roads, and to the laying out of new roads, not as ordered to be effected, but as actually done on the ground, and there is nothing to show the *locus in quo* to the part of a road actually opened or laid out under the order of sessions.

As regards the excess of damages complained of in this case, I am not disposed to disturb the verdict. If the value of the land is taken to be excluded from the amount of the verdict, because of the title still remaining with the plaintiff, the damages may perhaps be considered as assessed too high; but the whole sum given is small, and moreover, if the municipality should consider it right to pass a by-law, confirming the road as now opened, the fact of the plaintiff, by means of the verdict, having recovered full compensation for the value of his land, will be considered, in the event of any application of his to be further reimbursed. I agree with the rest of the court in thinking that the rule in this case should be discharged.

MARMORA FOUNDRY COMPANY v. MURNEY.

Action for calls—Evidence—Stockholders admissible as witnesses—Non user—Forfeiture of shares.

Action for calls under the statute 1 Wm. IV., chap. 12, against the defendant as one of the stockholders: *Held per Cur.*—that stockholders in the said corporation are admissible as witnesses for the plaintiffs, under the statute 12 Vic. ch. 70; that proof of a conveyance of Hetherington's interest in the Marmora Iron Works was not required under any of the issues; that the said act is not obsolete for non use; that the clauses of the said act requiring the books of subscription to be opened within two months, is only directory; that the subscription books subsequently opened may be considered as in connexion with the subscription books previously opened, and that all the proceedings from the beginning may be taken together in connection with or relation to the object; that the omission of Hetherington's name in the new subscription books (he being dead) does not render the proceedings of the company invalid, nor is it fatal to the plaintiffs in this action; that the sanction for the opening of the new subscription books of the two surviving petitioners to parliament for the act of incorporation is sufficient; that the names of the petitioners in the said act named need not necessarily be signed to the new subscription books; that the defendant was not discharged from his liability by a minute made at a meeting of the directors, and entered in their minute book, declaring that the names of all stockholders who were in arrear should be erased from the subscription stock book of the company.

(C. P., T. T., 13 Vic.)

This is an action of debt for the first ten per cent., and two subsequent calls of ten per cent. each, on twenty-five shares of £12 10s. each of the capital stock of the said company, subscribed for by the defendant. The declaration contains three counts—one for each instalment (for which see the case on demurrer).

The defendant pleaded to the first count:

1. Never indebted, *modo et forma*; concluding to the country.

2. That the plaintiffs induced the defendant to contract the said debt by fraud, covin and misrepresentation; concluding with a verification.

3. That the defendant did not subscribe for nor become the owner or holder of the said number of shares of the said stock, or of any number or quantity; concluding to the country.

4. That no meeting of the subscribers to or for the stock of the plaintiffs was at any time before the commencement of this suit duly had, convened, or called together for the election of directors, *modo et forma*; concluding to the country.

5. That no notice of such meeting, as in the said first count mentioned, was duly given or published in the *Upper Canada Gazette*, or the said other papers therein mentioned, *modo et forma*; concluding to the country.

6. That no election of directors for the direction of the affairs of the company, as therein mentioned, was duly made before the commencement of this suit, *modo et forma*; concluding to the country.

7. That no books of subscription were opened within two months after the passing of the act (1 Wm. IV., ch. 12), as thereby required; concluding with a verification.

8. That no books of subscription were opened under the authority or direction of a majority of the petitioners in the said act named, before the commencement of this suit; concluding with a verification.

9. That no books of subscription were ever opened according to the provisions of the said act; concluding with a verification.

10. That no person or persons were ever directed or appointed before the commencement of this suit by a majority of the petitioners in the said act named to open books of subscription for stock of the said company; concluding with a verification.

11. That before the commencement of this suit, by reason of the non-payment of the said instalment in the said first count mentioned, and the neglect and refusal to pay the same by the defendant, the said shares therein mentioned became and were, by the said act, forfeited, and plaintiffs assented thereto, and acquiesced in the said forfeiture; concluding with a verification.

Demurrer to second and third counts, and joinder in demurrer.

Replication to 1st, 3rd, 4th, 5th and 6th plea; *similiters* to 2nd, *de injuria*.

To 7th: That books of subscription were opened within two months after the passing of the said act; concluding to the country, and issue joined.

To 8th: That books of subscription were opened under the authority and directions of a majority of the petitioners in the said act mentioned, before the commencement of this suit; concluding to the country, and issue joined.

To 9th: That books of subscription were opened according to the provisions of the said act; concluding to the country, and issue joined.

To 10th: That a person was directed and appointed before the commencement of this suit, by a majority of the petitioners in the said act named, to open books of subscription for stock of the said company; concluding to the country, and issue joined.

To 11th: That the said shares in the said first count mentioned were not, nor was any of them forfeited, *modo et forma*; concluding to the country, and issue joined.

Venire to try the issues and assess, contingent damages, &c. This case was tried before Mr. Justice Draper at the last assizes, held at Belleville, for the County of Hastings, when the jury found a verdict for the plaintiffs on all the issues, with damages (in debt) on the first

count, to £27 3s. 6d., and assessed contingent damages on the second count at £26 10s., and on the third count at £26 5s.

Last term a rule was granted, on the motion of the defendant's counsel, calling on the plaintiffs to show cause why the verdict should not be set aside, and a nonsuit entered on leave reserved, as being contrary to law and evidence, and the judge's charge; against which cause was shown during the same term.

It appeared in evidence, that the formation of the plaintiffs' company was authorised by the statute of U. Canada 1 Wm. IV., ch. 12, passed the 16th March, 1831, which recited, among other things, that Thomas Hetherington, Peter McGill, and Anthony Manahan, had by petition, represented that the said Hetherington was then the proprietor of the establishment and manufactory, situate in the township of Marmora, in the Midland District, called "The Marmora Iron Works," and that he was willing and desirous to depart with his sole property therein to a company to be formed and incorporated for the purpose of carrying on the said manufactory, and that said petitioners had prayed that they, together with such others as should become stockholders in the company, might be incorporated for the said purpose, and enacts that the said Hetherington, McGill and Manahan, and all such persons as should thereinafter become stockholders in the said company, should be, and were thereby constituted and declared to be a body corporate and politic, by the name of the "Marmora Foundry Company," with continued succession; and by such name should be capable of contracting, and being contracted with, of suing and being sued (*a*) in all courts and places, in all manner of actions, &c., and might have a common seal, and might and should be capable of purchasing, having and holding to them and their successors, any estate, real, personal or mixed, to and for the use of the said company, &c., &c.

Sec. 2 limits the whole amount of stock, estate and property which the company should hold, to £50,000; that the shares should be £12 10s. each, and not exceed 4,000 in number.

Sec. 3 enacts that books of subscription should be opened within two months of the passing of the act; when, where, and by such person or persons, and under such regulations as the majority of the petitioners should direct and appoint.

Sec. 4 enacts that any person might subscribe for any number of shares, the amount whereof should be due and payable to the company as therein mentioned.

(*a*) Statutes 7 W. IV. ch. 14, sec. 14; 12 Vic., ch. 10, sec. 5, No. 24.

Sec. 5 enacts that any stockholder neglecting or refusing to pay instalments due on any share or shares, shall forfeit such share or shares with the amount paid thereon, and that they shall be sold in such manner as the director shall think fit.

Sec. 7 enacts that on £20,000 being subscribed for, it shall be lawful to call a meeting of the shareholders for the purpose of electing directors, and that the directors then elected shall be capable of serving until the 1st Monday in August succeeding; that on £1,000 being paid on the shares subscribed, the directors shall commence the business operations of the company; provided that no such meeting shall take place, until notice thereof shall have been published in the *Upper Canada Gazette*, and some two of the newspapers published in the Midland District, at the distance of not less than thirty days previous to such meeting.

Sec. 8 enacts, that the affairs of the company shall be managed by five directors, one being president; to be elected, &c., as therein (and in sec. 12,) prescribed, &c.

Sec. 9 enacts, that in case an election of directors shall not be made on the day prescribed, the company shall not in that case be deemed to be dissolved, but the election may be made on any other day, in a manner regulated by the laws and orders of the company, &c.

Sec. 10 enacts, that the directors may make by-laws, &c.

Sec. 11, and declare dividends, &c.

The act contains no limitation clause.

At the trial of the cause three witnesses were called for the plaintiff, one of whom said he thought he had subscribed for some shares in a book opened at his office in Kingston, in the year 1831, but that that being many more than six years ago he did not consider himself a stockholder.

The other two witnesses stated that they had signed a subscription for stock in a book opened at Belleville in 1848. It was objected that none of the witnesses were admissible, but their evidence was received —Taylor's Evidence, 871, 974, 978; 12 J. 581; 13 J. 494.

The first witness stated, that soon after the passing of the act in 1831 stock-books were opened at his office in Kingston, in the Midland District, in which District the Marmora Iron Works were then situated. Notice to produce such books was served on the defendant. This witness said the books had been several years in his office, that he could not then find them, and that he did not know what had become of them; that they had been put away among old papers as perfectly useless; that his office had been moved since, and whether the books had been delivered to any other parties or not he could not say, but he had no recollection

of giving them to any one; that they might be in his office still, though he had searched two or three days for them without success; he thought they were lost; that all the subscription-books were prepared at Kingston, and that the following names were placed at the head of every book, viz., Peter McGill, Thomas Hetherington, and Anthony Manahan, by whose authority they were opened; that one was sent to Belleville; a notice that books were opened was published in the *Chronicle* and *Gazette*, at Kingston, about March or April, 1849; admitted that defendant did not subscribe in these books.

The second witness called stated, that he had subscribed for stock in a book opened at Belleville in 1848, and that the defendant also subscribed therein, proving his signature. This book was headed thus:—

"A subscription list of the stockholders of the Marmora Foundry Company, proposed to be established by virtue and under the authority of a statute of the late Provincial Parliament of Upper Canada, passed 16th March, 1831, in the first year of the reign of his late Majesty King William the Fourth, chapter 12, and the undersigned hereby promise to pay the amounts opposite to their respective names to the party hereafter authorised to receive the same, in such instalments as are authorised by the statute, after the election of directors by the stockholders shall have taken place in accordance with the provisions of the enactment referred to.

"Names.	Residence.	No. of Shares.	Amount.
"116. Edmund Murney,	Belleville,	20,	£250."

That more than £20,000 having been subscribed for, a notice, calling a public meeting, was duly published in the *Upper Canada Gazette* of 25th November, such meeting to be held on the 27th December following, and in the other papers as required by the act; that the meeting was held on the 27th December; that defendant was present, and that five directors were elected.

The third witness proved the loss or destruction of the original manuscript notices calling the meeting above mentioned, so as to admit secondary evidence thereof; he also proved the loss of a notice signed by Peter McGill and Anthony Manahan, two of the petitioners named in the act, the third (Hetherington) being dead.

The notice being in these words:—

"According to the third section of the twelfth chapter 1 Wm. IV., for the purpose of opening books of subscription for the stock in the Marmora Foundry Company, we, the surviving persons by the said act authorised, hereby direct and appoint that books of subscription be

opened at the following places, by the following persons, and on the dates within mentioned:

At Belleville, 17th October, 1848, by —— ——
At Kingston, 18th " " by —— ——
At Cobourg, 18th " " by —— ——

"And also at Picton, Port Hope, on the 18th, and at Toronto, Hamilton, Montreal and Peterborough, on the 23rd October, 1848.

(Signed) "PETER MCGILL,
A. MANAHAN."

The witness, (being the secretary of the company), on cross examination, produced and proved a minute-book of the directors, which, among other things, contained the following entry, made at a meeting of the directors held at Belleville, on the 1st of August, 1849:— "Present—Nelson G. Reynolds, Esq., President; Peter Robertson, Esq., and Robert Read, Esq. It was ordered, that the names of all subscribers to the capital stock of the company, who have not yet paid any instalment on the same, be erased from the subscription stock-book of the company."—(See section 5 of the act.)

At the trial of the cause the defendant called no witnesses, but his counsel objected—

1st. That it appeared the books were originally opened in 1831, for the subscription of stock pursuant to the statute; that the books opened in 1848 were not opened under the act; that the words "proposed to be established," were omitted, and the very heading and character of the promise to pay shewed it; nor was it a carrying on of the old company, and that the original subscribers were the persons to have elected the directors.

2ndly. That the names of the three petitioners named in the act are not subscribed in the books now produced, being the books the parties are acting on.

3rdly. That there is no proof of the election of any directors since 1848, or that there were any when this action was brought, or that there are directors at the present time.

4thly. That there is no proof of notice to the defendant of the first election of directors, and that the first instalment was not payable until he had such notice.

5thly. That there is no proof of the payment of £1,000 under sec. 7.

6thly. That if the second and the third witnesses are inadmissible, there is no evidence to charge the defendant, and that they are not admissible.

Leave was reserved to the defendant to move a nonsuit on the foregoing objections.

And the reply was allowed to the plaintiff's counsel on account of the proof of the minute-book, and entry therein, proved by the secretary (a witness of plaintiff's) on cross-examination. The only matter left to the jury was, whether by reason of the defendant's non-payment of the first instalment, the shares subscribed by him were forfeited, and such forfeiture assented to and acquiesced in by the plaintiffs; the minute of the directors being left to them as evidence on that issue.

On the other issues the jury were directed generally to find for the plaintiffs, subject to the leave reserved to the defendant to move a nonsuit, and were told there was no evidence to support the plea of fraud.

The jury returned a verdict for the plaintiffs on all the issues, with £27 3s. 6d., damages on the first count, and assessed contingent damages on the second count, at £26 10s., and on the third, at £26 5s., as already mentioned.

Eccles for defendant, at the argument, on the return of the rule nisi, contended—

1st. That there was no proof of any conveyance from Hetherington to the plaintiffs, without which they had no title to the premises, and the necessity whereof was questioned by the learned judge at nisi prius.

2ndly. That the evidence proved the company formed in 1831, (if the witnesses were admissible) which company may still exist, and the plaintiff could not, nineteen years afterwards open new books and begin *de novo*, and that mere non user as determined in the case of the *plaintiffs* v. *Ponton*, would not put an end to such company; that there however it was a naked point in the face of the pleading, while here the facts are specially shown, and proved a double proceeding in 1831 and in 1848; that if the first attempt proved abortive it could not be renewed, especially at this late period (4 M. & W. 483, Follett *arguendo*); that lapse of time shewed an abandonment of the scheme, and that it could not be revived that Hetherington was a party to the first books, but not to the last, and being dead he is no party to the present company, and his estate must have descended to the heir-at-law, who is not shown to be a party, if that would do; that none of the petitioners are parties or subscribers to the present stock, and that the company, being formed independently of them, has not a valid legal existence under the act; also, that Hetherington's death presents an insuperable obstacle, even if the other two had become shareholders and parties, no right of survivorship being reserved.

3rdly. That there was no proof of any directors existing since 1848, and, therefore, no one entitled to sue (sec. 9 of the act).

4thly. That notice of the first election of directors should have been

given, and in its absence the defendant is non liable (sec. 7 of the act).

5thly. That there was no proof of payment of the £1,000.

6thly. That the three witnesses called at the trial were inadmissible, especially the two last, being interested, and the action brought in their immediate or individual behalf, within the meaning of the proviso in the statute 12 Vic., ch. 20, sec. 1 (*a*); that however inhabitants or corporators, under municipal or public (non-trading) companies may be admissible, the members of trading companies are not so, owing to their obvious personal and pecuniary interest; that they are *cestui que* trusts, and the parties beneficially interested and like co-partners in trade under ordinary partnerships—the members being the only parties who have an interest—2 M. & W. 206.

7thly. That the defendant is not estopped by his signature and undertaking in the plaintiff's book; and if he was, the declaration of forfeiture entered in their books, in August, 1849, puts an end to his liability.

Hagarty for the plaintiffs, contended:

1st. That books were opened in 1831—and if necessary to support the books and subscriptions thereto in 1848, they may be regarded as the inception of the formation of the company, and as virtually continuing open until 1848, that there was no proof of their having been closed, or the project abandoned, beyond mere lapse of time and quiescence, whence nothing can be inferred; that no persons possessed authority to put an end to the act even by express declaration, much less tacitly by mere delay; that the proceedings were inchoate, and only delayed or suspended

2ndly. That the witnesses were admissible under the late act, this action having been commenced after the passing of the said act; that their being members of the corporation is not a sufficient objection (12 Jurist, 1054). The test of Parke B. not applicable, their admissions not being evidence against the plaintiffs, nor the suit brought in their immediate or individual behalf—12 Ju. 581; (*b*) 3 C. B. 299; *Watson* v. *City of Toronto Gas Light and Water Co.*, *ante* p. 75.

(*a*) 13 M. & W. 640.

(*b*) This was the case (*Regina* v. *Vickery*) of an overseer refusing to give evidence in regard to his parish. It appeared that by the statute 8 & 4 Vic. c. 26, rated inhabitants and parish officers were rendered competent witnesses for and against their parish, and the defendant was consequently held bound to give the evidence required of him. In giving judgment, Lord Denman, C. J., in remarking upon the objection of the defendant to give evidence against his own parish, said—"Gradually objections of this nature have been removed—objections which are disgraceful to any man who takes them, and make one blush to administer the law which allows them."

3rdly. That the mere resolutions to cancel was not a forfeiture completed, only a step towards it. The plaintiffs in this suit v. Ponton—6 M. & S. 707; 1 Q. B. 256; 11 M. & W. 804; 11 su. 31; that most acts of this kind require a special meeting to declare forfeitures—although this act does not contain any such provision; that no proof of the present existence of directors was necessary, there being no such issue raised, and that therefore the existence of directors is to be presumed. Neither was the payment of £1,000 put in issue, or material to be proved; so far as important, it must in these pleadings be presumed that the plaintiffs' company went regularly into operation—7 M. & G. 899.

MACAULAY, C. J.—The first consideration is the admissibility of the witnesses, which no longer depends upon the mere question, whether they have technically any pecuniary interest in the event of the suit—but upon the effect of the statute 12 Vic., ch. 70, founded on the Imperial statute 6 & 7 Vic. ch. 85, which enacts, that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest, excepting, however, (among others) any party to any action, suit or proceeding individually named in the record, or any person in whose immediate or individual behalf any action may be brought or defended, either wholly or in part, &c. (*a*) The defendants are not individually named in the record, and consequently, it depends upon whether the action is brought wholly or in part in their immediate or individual behalf. It appears to me the witnesses were admissible, on the ground that the action is not brought in their immediate or individual behalf, wholly or in part; no test, that I have found suggested, would apply to show them incompetent; they did not direct the bringing of the suit, are not liable for costs, nor are they entitled to the proceeds; their declarations would not be admissible in evidence against the plaintiffs, and their interest is indirect and contingent; if the action was brought for the recovery of an ordinary debt due to the plaintiffs, they would have no direct right to a share of the sum recovered—it would form corporate funds, and their interest therein would depend upon the extent to which it might affect the periodical dividends, or the ultimate division of the assets, upon winding up the affairs of the company; the immediate disposal of the funds would rest with the body corporate, through its directors; and individual stockholders are only interested therein collaterally, as they may enhance dividends or the ultimate surplus.

(*a*) This is the same as the statute 16 Vic. c. 19, s. 1, now consolidated in the Consolidated Statutes for Upper Canada, ch. 32.

But the present action is not for a debt contracted in the ordinary course of the plaintiff's business, but to enforce payment of calls upon stock subscribed for by the defendant. If recovered, the witnesses will have no right to participate in the distribution thereof, it will form part of the capital funds, and their only interest will be contingent upon whatever effect the sum recovered may have upon the profits and gain of the company, and consequently, upon their shares in the dividends. The money is not to go to them; and if the affairs of the corporation were wound up, it would be returned to the defendant. If the plaintiffs' affairs prosper, they will derive no benefit except contingently in the shape of dividends, without any right to the capital sum contributed by the defendant. If the business is unsuccessful, the result of this suit will not increase or diminish their liability to sustain loss, which is limited to the amount of their own stock, respectively; and I do not think the contingent and indirect interest which they have, can be considered as showing the suit to be brought in their immediate or individual behalf, wholly or in part.—*Sage* v. *Robinson*, 12 Ju. 1054; (*a*) S. C. 3 Ex. 142; *Colombine* v. *Penhall*, 14 Ju. 460; *Clarke* v. *Bell*, 12 Ju. 421; *Needam* v. *Law*, 12 M. & W. 560; *Uidal* v. *Walton*, 14 M. & W. 254; *Hart* v. *Stephens*, 6 Q. B. 937; *Hill* v. *Kiching*, 3 C. B. 299; *Belcher* v. *Brake*, 2 C. & K. 658; 2 Taylor Ev. 893, sec. 978; Prov. Stat. 12 Vic. ch. 84, sec. 31; 19 Law J., V. C. R. B. 278. Being of this opinion, it becomes necessary to notice the other points of objection, which can only properly be entertained in reference to the issues to be tried.

1. This remark applies to the first point made at the argument—namely, that no conveyance from Hetherington to the plaintiffs was proved; such proof was not required under any of the issues, nor was such a conveyance a condition precedent to the plaintiffs' right to make or sue for calls. It might be necessary to raise funds, in the first instance, to enable the plaintiffs to treat with him for the renting or purchasing of the Marmora Works.

2. With respect to the second point; *Lee* v. *Milner*, 2 M. & W. 824; *Thickness* v. *Lancaster Canal Company*, 4 M. & W. 472—show that

(*a*) In this case, a party on his *voir dire*, swore that he had indemnified the defendant and would share the loss, and he was held to be a competent witness perhaps even independently of the statute. It was also laid down, that the test as to whether the witness is a "person in whose immediate and individual behalf an action is brought or defended, either wholly or in part," is—would his declarations be receivable against the party on whose behalf he is called to give evidence? The onus of showing that the witness is within the proviso, lies upon the party objecting.

the statute 1 Wm. IV., ch. 12, is not obsolete or at an end for non-user; that mere delay did not put an end to the company for non-user, was decided in the case of the present plaintiffs against Ponton, in this court; and notwithstanding the abortive attempts to establish the company soon after the passing of the act, proceedings might be resumed. So far as the opening of books within two months was indispensable under the third section of the act—books were in fact opened within that time; I am not satisfied, however, that this clause was more than directory, or that the time is so material as to render the opening of books within the period prescribed a condition precedent; I am disposed to think not.—3 Bur. 1866; 4 Q. B. 431; 7 Q. B. 339.

If, however essential, I think the whole proceedings must be taken together, and the original books be regarded as the incipient step to meet the exigencies of time, followed by the late proceedings in furtherance of the same object—there is no proof, except delay, of any abandonment of the scheme—the act and the early steps under it have remained dormant for many years, but the cases cited do not seem to warrant us in saying that such a delay can be regarded as a total abandonment, or that the act is null, unlimited as it is respecting the period within which the company was to be formed and go into operation.

Although there is no direct connexion between the old and the new books, by reference or otherwise—still, under this objection, I think all the proceedings from the beginning may be taken together in connexion or relation to the object.

As to the use of Hetherington's name in the new books, I do not think its omission fatal to all that has been done. The recital to the act of incorporation shows that he (being owner of the works) was an original projector and applicant for the corporation, not only assenting to, but soliciting its creation, and it appears that he was accordingly a party to the original stock-books; and he being since dead, the remaining two of the applicants to parliament sanctioned the opening of the last books. Even if such books were actually opened before the sanction and direction of the surviving petitioners was obtained, their subsequent adoption of such act gave validity thereto from that time forward, on the doctrine of principal and agent, and the rule of adoption *ex post facto*—*Vide* cases noted in 2 M. & G. 679, 689, 690; 7 M. & W. 243; 14 Ju. 132 (*a*); 2 Ea. 118.

(*a*) In this case (*Bird* v. *Brown*) it was held that the maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, as applied to cases of contract, means that if A, unauthorised by B, makes a contract on his behalf with C, which

It does not appear that Hetherington, McGill, or Manahan, subscribed for any stock in the first books, or in those more recently opened; although it was no doubt contemplated they would, or that they were by the act required to take stock.

The statute upon their petition constituted them, and all such persons as should thereafter become stockholders, a body corporate, with continued succession, with power of contracting, &c, and of suing and being sued; and in sec. 3, enacted that books should be opened within two months—when, where, and by such person or persons, and under such regulations as the majority of the petitioners should direct and appoint; a proceeding no doubt adopted in order to facilitate the organization of the company, by entrusting the preliminary steps, before there were any stockholders or directors, to the petitioners, and which they might take without becoming subscribers for stock after the books were opened. Although not organized until 1848, the company was created when the act passed, and continued to exist from that period, notwithstanding its not going into operation for want of members until recently. The evidence shows that books were opened within two months, under and according to the provisions contained in sec. 3, which in strictness proves the issue. The defendant does not plead that the books in which he subscribed were not opened within that time—but that no books were opened. There is much force too in the argument that the defendant is estopped by his own act, in subscribing in the stock-books, acting as a committee-man, and attending and participating in the first election of directors, from objecting to the non-observance of any such preliminary steps.—2 Q. B. 281; 4 Q. B. 431; 7 M. & W. 574.

The want of proof of the continued periodical elections of directors, and of their being directors when this action was brought, is not a matter in issue; the plea is, that no election of directors was duly made before the suit, as in the act mentioned, amounting to a denial that any directors were ever elected, and referring to the necessity for such an election before the first ten per cent. of the stock subscribed became payable; such an election is proved to have taken place (*a*), and the objection, if meant to relate to the time the action was brought, is answered by the decision of the Court of Queen's Bench for Upper

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B afterwards recognizes and adopts, the contract is to be dealt with as having been originally made by his authority.—See also *Broom's Legal Maxims*, pp. 566 and 676.

(*a*) Statutes 7 Wm. IV., ch. 14, sec. 15; 1 Wm. IV., ch. 11, sec. 9; 12 Vic., ch. 10, sec. 5, No. 24.

Canada.—*The Railway Company* v. *Crookshank*, 4 U. C. R. 309, and the same plaintiffs v. *Gwynne*.

I do not think notice of the election of the first directors a necessary step, nor are the facts of notice, or the payment of £1,000 put in issue by the pleadings, otherwise than by the plea of *nil debet*.—6 M. & W. 707.

It appears in evidence, however, that the defendant was present at the election of directors, and, of course, had notice thereof, and proof of payment of the £1,000 was unnecessary; the clause is only mandatory or directory to the directors to commence business operations as soon as that sum was paid, and if no subscriber for stock could be sued or compelled to pay calls until that amount was voluntarily paid, the commencement of business might be effectually prevented; funds must first be realized, and it may be that £1,000 has not yet been paid up, or business operations commenced.

As to the alleged forfeiture, I do not think the entry in the plaintiffs' minute book, regarded either as an election or assent, had the effect of discharging the defendant from his liability, or that he thereupon ceased to be a shareholder; the point was, to a certain extent, involved and disposed of in the suit of the present plaintiffs v. *Ponton*, in this court.—1 Q. B. 256; 6 M. & W. 707; 2 M. & G. 674 & 689; 15 M. & W. 718; 1 Ex. 739; 3 Ex. R. 18; 18 L. J. Ex. 53; 13 Ju. 1008; 5 B. N. S. 270 and 135.

The prov. stat. 1 Wm. IV., ch. 12, contains no express clause respecting suits for calls, but it was decided in the case against Ponton, that the plaintiffs may sue therefor, under the general provisions contained in the first section of the act—the prov. stat. 7 Wm. IV., ch. 14, sec. 14, and 12 Vic. ch. 10, sec. 5, No. 24, and the words of sec. 4—that the amount of shares subscribed for should be due and payable to the company, as therein mentioned—that is, that ten per cent. should be payable to the company immediately after the election of directors, and the remainder by instalments of ten per cent. as called for; but sec. 5, enacted that if any stockholder neglected or refused to pay to the said company any instalment due on any share or shares held by him at the time required by law, he should forfeit such share or shares, with the amount paid thereon; and such share or shares should be sold for the best price, in such a manner as the directors should think fit. It was also held in the case against Ponton, that the stockholder could not at his own discretion elect to forfeit his shares and exonerate himself from liability to the payment of calls; that it rested with the plaintiffs to enforce forfeitures in their discretion, and that they might waive

them although incurred; the question here is—whether or not they have elected the forfeiture of the defendant's shares, and have thereby exonerated him from liability to pay the first ten per cent. thereon.

The first election of directors took place on the 27th of December, 1848, immediately after which the ten per cent. declared for in this count became payable to the plaintiffs, and being then due and payable, a right of action therefor vested in them. On the 1st of August, 1849, (the defendant not having paid anything on his stock) it was—at a meeting of the directors, where the president and two others only were present—ordered, that the names of all subscribers to the capital stock who had not yet paid any instalment on the same, be erased from the subscription stock books of the company. On reference to the almanac, it will be found that this order must have been the act of the directors elected on the 27th December, 1848, because by the act, sec. 7 & 8, the annual elections, after the first, are appointed to take place on the first Monday in August, which, in the year 1849, was the sixth day of that month.

It does not appear whether the other two directors (five being the whole number,) were present when such order was made, or whether it was a periodical and regular, or a casual or specially convened meeting of the board. However, it is not shewn that such order was ever communicated to the shareholders alluded to therein, or that their names were erased, or that it was ever acted upon.

The present action is brought since 6th August, 1849, and consequently in the time of the directors elected on that day. Presuming such election to have duly taken place in the absence of any proof to the contrary, and admitting that the directors have only an alternative right to enforce payment of the instalments by action, or to declare the shares forfeited, I do not think the mere resolution or order of a majority of them, that the names of defaulters should be erased from the books, although no doubt with an intention to enforce the forfeiture of the shares, is without some other act sufficient to conclude the plaintiffs. I think it is rather to be looked upon as a step taken *in terrorem*, and an inchoate proceeding, unless acted upon and executed. Had the defendant's name been erased, it would have been another thing; but this was not done, and not being executed, I do not consider the order in question more than an incipient step towards the actual forfeiture, or conclusion upon either party to disfranchise the defendant, or to estop the plaintiffs from afterwards suing for the ten per cent. due and payable on and from the 27th December previous. To render the forfeiture complete under the order the names should have been actually erased,

if that would be effectual. The directors did not in so many words say the shares were or should be thenceforth forfeited, but that the names of defaulters should be erased, indicating thereby an intention to enforce the forfeiture by an ulterior step, and yet not take it. It required, I think, something more to be superadded—that is, an actual erasure and notice thereof to the defendant, or at least erasure if a forfeiture could be thereby accomplished. In *Jones* v. *Carter*, (15 M. & W. 718), it was held that service by the lessor of a declaration in ejectment upon the lessee for the demised premises, for a forfeiture under a proviso in the lease, that for any breach of covenant it should be utterly void and the lessor be at liberty to re-enter, operated as a final election by the lessor to determine the term, and that he could not afterwards (although there had not been any judgment in the ejectment) sue for rent due in covenants broken after the service of the declaration; but in that case there was a direct overt act in the service of the declaration, and notice to the tenant, who was treated as a trespasser, and who was admitted to defend on the terms of confessing lease, entry, ouster and possession of the plaintiff; and Parke, B., observed and relied upon such considerations, for the tenant had appeared and entered into the consent rule, the lessor of the plaintiff does more than order an action of ejectment to be brought, he actually instituted it, and served the declaration upon the tenant; this was held to render void what before was only voidable, so that the lease could not afterwards be set up again at the election of the landlord, and treated as subsisting. If the order of the directors was of itself equivalent to the service of the ejectment, in putting an end to the defendant's subscription, the analogy would hold; but I do not think it entitled to be so regarded. If the case was reversed, and had the defendant (desirous of continuing a stockholder) tendered the ten per cent. the day after such order, and the plaintiffs had refused, and the question been whether he had lost his shares, it is by no means clear to me that he would, although in that event such tender and refusal would have been overt acts between the parties, evincing a desire to avoid and determination to enforce the forfeiture. To this may be added a question, whether the proper mode of enforcing a forfeiture under the act is not by a sale of the shares, and not a cancellation of the defendant's subscription for stock. Before a sale, he might obtain relief in equity, if desirous of retaining his stock, wherefore his shares should not be cancelled, but held subject to sale and transfer to a new purchaser under the act. As erasure of the names as cancelling the shares might entitle the stockholders who had paid such instalments to recover back the money as upon a contract mutually put an end to; or

if not, the cancellation of the shares instead of their sale, as forfeited to the company, might be productive of consequences prejudicial to either party, not contemplated by the act, which could not arise if the mode of proceeding to enforce forfeiture by sale be adhered to.

Adverting to the several issues joined, it appears to me,

1st, That there is no evidence to support the plea of fraud.

2nd, That defendant did subscribe for and become the owner and holder of shares as alleged in the first count.

3rd, That a meeting of the subscribers was before suit duly had, convened, and called together, for the election of directors.

4th, That notice of such meeting was duly given, as in the first count alleged.

5th, That an election of directors, as there also alleged, was made before suit.

6th, That books of subscription were opened within two months after the passing of the statute 1 Wm. IV., ch. 12, as thereby required.

7th, That books of subscription were opened under the authority or direction of a majority of the petitioners in such act named before suit.

8th, That persons were directed or appointed before suit by a majority of the said petitioners, to open books of subscription for stock of the said company.

9th, That books of subscription were opened according to the provisions of the act.

10th, That defendant's shares were not before suit forfeited, and such forfeiture assented to and acquiesced in by the plaintiffs.

11th, And that under the plea of *nil debet*, the plaintiffs are entitled to recover under the evidence, consequently the rule should be discharged.

McLEAN, J.—As to competency of witness, see *Fletcher* v *Greenwell* (3 Tyr. 31). Under an act of parliament (a local act) the directors and guardians of the poor of a parish were to sue and be sued in the name of their clerk. In an action of assumpsit against him for work done by their order, *held* that a person who was a director at the time the cause of action arose, is a good witness for the defendant.

McGahey, vestry clerk of St. Pancras, *Middlesex* v. *Alston & Sewell* (2 M. & W. 206)—the same point decided as in the above case.

12 Vic., ch. 70—"An act to improve the law of evidence in Upper Canada." Sec. 1. "That every person so offered may and shall be admitted to give evidence on oath, &c., notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit,

action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence; provided that this act shall not render competent any party to any suit, action or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord, or such person in whose right any defendant in replevin may make cognizance, or any person in *immediate or individual behalf* any action may be brought or defended either wholly or in part, or the husband or wife of *such persons respectively*."

Motion to set aside verdict and enter nonsuit on various grounds, pursuant to leave; the principal object being the admission of stockholders as witnesses, on the ground that such stockholders were incompetent to be witnesses. Under the statute 12 Vic., ch. 70, no one is disqualified from giving evidence except such as are specified in the proviso contained in sec. 1. The witnesses objected to in this case, if incompetent, must be so on the ground urged, that this action is brought wholly or in part for the *immediate* or *individual* behalf of these witnesses. Now I think it is quite clear that the action was not brought for their *immediate* or *individual* behalf. They had only a joint interest with others in the company, and could have no immediate or individual interest in the money sought to be recovered, or the proceedings instituted for the recovery of such money. The payment of stock to enable the company to go into operation and carry on the business for which it was incorporated is required by the statute, but no stockholder can have a particular or several interest in any particular portion of the stock; and the interest in the whole amount is of that uncertain nature that no one subscriber for stock could be rejected on account of it. The value of the stock must necessarily depend upon the success of the company; and it might happen that the whole stock subscribed might prove a total loss. In 12 M. & W. 559, it was held that a party whose interest was remote or uncertain, even before the passing of the act to improve the law of evidence, was a competent witness; and Parke, B., says that the question of competency on the score of interest was of little consequence since the passing of that act. I think the testimony of the witnesses was properly received; and the very fact of a stockholder being liable to be sued by the company for money due, confirms me in that opinion. If a partner or stockholder may be sued, what good reason can be assigned why such stockholder may not be a witness in any cause in which the company may be a party, and in which such stockholder may have a remote and uncertain interest.

This has always, since the argument appeared to me to be the only point on which any doubt could be entertained. I quite concur in the view taken by the Chief Justice, with respect to all the points taken on the trial. The rule for a new trial must therefore, in my opinion, be discharged.

SULLIVAN, J., concurred.

MARMORA FOUNDRY COMPANY v. BOSWELL.

Incorporated company—Liability of shareholders—Pleading.

Demurrers to declaration and pleadings, under the statute 1 Wm. IV., chap. 12.

(C. P., T. T., 13 Vic.)

Writ issued 6th April, 1850.—Declaration 4th September, 1850.—Defendant for £37 10s.

1st count states, that on the 1st of November, 1848, the defendant subscribed for ten shares of the capital stock of the plaintiffs, of £12 10s. each; in all, £125 payable ten per cent. on each share immediately after the first election of directors, and the residue by instalments not exceeding ten per cent. at such periods as the president and directors should direct and appoint; provided that none of the said last mentioned instalments should be called for, in less than forty days after notice, in the *Upper Canada Gazette*, and two or more newspapers published in the then Midland District; that afterwards £20,000 of the said stock being subscribed, the subscribers called a meeting at the court-house in Belleville, of which notice was published in the *Upper Canada Gazette*, and two other newspapers printed in the then Midland District, thirty days previous, and at which five directors were elected, who were stockholders, and duly qualified, of which defendant had notice; whereupon ten per cent. on each share of the defendant, amounting to £12 10s., became due and payable from defendant to plaintiffs, yet defendant did not pay the same, whereby an action hath accrued, &c.

2nd count states, that after such subscription for stock, and the election for directors as aforesaid, &c., the president and directors did—to wit, on the 20th April, 1849—direct and appoint that an instalment of ten per cent. upon the capital stock of the plaintiffs, so held by defendant as aforesaid, should become due and payable from defendant to plaintiffs, on the 15th June then next, at the office of the Montreal Bank at Belleville, of which call public notice was given in the *Upper Canada Gazette*, and in the *Chronicle* and *Argus*, two newspapers published in the then Midland District, and in the *Intelligencer* and

Victoria Chronicle, two newspapers published in the then Victoria District, forty days before the day of payment. That such instalments thereby became due and payable from defendant to plaintiffs; yet defendant did not pay, whereby, &c.

3rd count states similar to the second for another instalment, laying this call on a different day, and a different day for payment thereof.

Demurrer to 1st, 2nd and 3rd counts.

To the 1st count: grounds specially assigned.

1st. Not alleged that books of subscription were opened within two months after the passing of the act.

2nd. Not alleged that notice of the meeting to elect directors was published according to the statute; the newspapers not alleged to have been published in the Midland and Victoria Districts.

3rd. Not shewn that the persons chosen directors were duly qualified.

4th. Not alleged that a deposit of £1,000 was paid in.

5th. Or that plaintiffs had commenced business before suit.

6th. That plaintiffs cannot sue for calls.

To 2nd and 3rd counts separately—

1st. That the call alleged was only partially upon defendant's stock, and not generally on the whole stock subscribed.

2nd. Not alleged that the directors were duly qualified.

3rd. Not alleged that a deposit of £1,000 was paid in.

4th. Or that plaintiffs had commenced business before suit.

5th. Plaintiffs not entitled to sue for calls.

The plaintiffs joined in demurrer.

The same Plaintiffs v. BEATTY. } The pleadings are similar.

The same Plaintiffs v. RUTTAN. } The declaration is similar to the above.

6th plea to the 1st count: That no books of subscription were opened within two months after the passing of the act—Verification.

10th plea to 1st count: That by reason of defendant's non-payment of said instalment, and his neglect and refusal to pay, the said shares became, and were by the act forfeited—Verification.

12th plea to 2nd and 3rd counts: That public notice of the calls in those several counts mentioned, was not duly given as in those counts alleged—To the country.

Demurrer to 6th, 10th and 12th pleas, special causes assigned.

To 6th plea—1st. That it amounts to never indebted, and should be so pleaded.

2nd. That it is confession and avoidance, and does not confess any

indebtedness, nor does it traverse, except that it argumentatively denies the alleged indebtedness.

3rd. The opening of books within two months not a condition precedent.

4th. But the statute on that head is only directory.

5th. Argumentatively denies that plaintiffs are a corporation, and should be in abatement.

6th. Does not go the merits of the action, only denies plaintiffs' corporate existence.

To 10th plea. That it is matter of law arising on the face of the declaration.

2nd. Is in confession and avoidance, and yet contains no new matter, but only matter of law drawn from the facts stated in the second count.

3rd. Does not shew a forfeiture.

4th. Does not show any action of directors to forfeit.

5th. Does not show forfeiture without assent of plaintiffs.

To 12th plea—1st. That it traverses too much, is too wide, denying the giving notice of the calls in both counts mentioned, without traversing as to each disjunctively.

2nd. Tries to compel plaintiff to prove the notice as to both calls jointly.

3rd. Alleging payment because it may be true, and yet plaintiffs entitled to recover one or other of the calls.

4th. Amounts to never indebted, which should have been pleaded.

MACAULAY, C. J.—The first objection, in point of order, is that the plaintiffs cannot maintain the actions at all.

Reference was made to the statutes 9 Vic., ch. 80, secs. 28 & 29, and 10 & 11 Vic., ch. 87, relating to the Cobourg Railroad Company, as evincing the opinion of the legislature, that, without express authority, trading corporations cannot sue for instalments or calls on stock subscribed; but on comparing the 4 Wm. IV., ch. 28, secs 17 & 18, and 9 Vic., ch. 80, secs. 28 & 29, with the 1 Wm. IV., ch. 12, secs. 4 & 5, it will be perceived that they are differently worded; the two first mentioned acts, in secs. 17 & 28, providing only that, as soon as directors were appointed, it should and might be lawful for them to call upon the stock-holders of the company, by giving thirty days' notice, &c., for an instalment of ten per cent. on each share, and the residue as therein specified. The 18th and 29th sections relate to forfeitures of stock in the event of default of payment. Thus framed, they might require the aid of the 10th and 11th Vic., ch. 87, to enable the company to enforce payment by action, according to the recital; and section

7, and the saving at the end of this section, shows that a right to sue may co-exist with a right to enforce forfeitures, under the 29th section of the 4th Wm. IV., ch. 28. However, the adoption of one course might operate as a waiver of the other.

But the 4th section of the act under which the plaintiffs are suing enacts, that the amount of shares subscribed shall be due and payable to the company as therein provided; and the defendant's counsel has not convinced us that, for instalments expressly made due and payable to the company, the plaintiffs cannot sue under the powers conferred by the 1st section of the statute; and we therefore adhere to the opinion already expressed on this head, in the case of the present plaintiffs v. *Ponton*.—13 East. 8; 1 Bing. N. S. 399, *Bedford et al*, v *Brutton et al.*; 6 More, 199, *Andrews* v. *Ellison et al.*; Chitty, jr., Forms, 480.

2ndly. As to the want of an averment that books were opened within two months no concise mode or form of declaring is provided for in the 1 Wm. IV., ch. 12, as in the 8th section of the 10 & 11 Vic., ch. 87, and many recent statutes, creating trading corporations of various kinds; and the brevity thereby authorised cannot be regarded as settled precedents that may be adopted in other cases.

Still such provisions indicate the disposition of the legislature to obviate technical nicetie in proceedings of this kind; and although, whatever is conditional to the plaintiff's right to sue must notwithstanding be stated by them, we still think the opening of books within two months not a condition precedent, requiring to be averred; and regard that part of the statute as directory only, independent of the argument of the defendant's being estopped by having subscribed in the books, at whatever time they may have been opened.

3rdly. The notice of the election of directors is alleged to have been published in the words of the statute, section 7; that is, published in newspapers printed at the places stated. If such papers were merely printed and not published, it would follow that the notice was not published, as therein averred; but its publication is not denied; and if published in such papers printed at those places, it seems to us sufficient, even if printing does not import publication. As to which see *Baldwin* v. *Ephinstone* (2 W. B. 1037).

4thly. We do not think the deposit of £1,000 a condition precedent to the plaintiffs' right to sue for calls. It was so intimated in the case of the plaintiffs v. *Murney (ante* p. 279); *Davidson* v. *Gill* (1 East. 72).

5thly. If all or any of the persons elected directors were not duly qualified, there was a mode by which their election might be set aside; but it being alleged that five stockholders, duly qualified, were elected,

they were directors *de facto;* and we do not think it a valid defence to this action, that some one or all of them may not have possessed the requisite number of shares, or been otherwise not duly qualified. It would not be a good defence if pleaded in denial; and so far as is material to aver due qualification, we think it sufficiently done, although it is not expressly averred that each director held stock to the extent of ten shares. At all events, if the allegation is not sufficient, the defect is not pointed out in the cause of special demurrer assigned. It is not stated that the plaintiffs have averred that each stockholder was a subscriber to the number of ten shares, if that is the objection intended; the cause assigned is, that it is not alleged or shewn that the persons so chosen to be directors were duly qualified as stockholders, in accordance with the act; whereas it is alleged that the stockholders did duly elect five directors, who were at the time of their election stockholders in the said company, and duly qualified according to law to be elected directors. If anything more specific should have been added, the omission is not pointed out.—*The Company of the Norwich and Lowestoft Navigation* v. *Theobald* (M. & M. 151).

The case cited of *Preston* v. *Guyon* (19 L. J. N. S. pt. 3, p. 73) was in Chancery.

The averment is made according to the usual forms in the books of precedents, and is not inconsistent with the call having been general on all the stockholders. The act does not say the calls shall be general, though probably so intended, and it possibly may be that all the stockholders except the defendant have already paid the instalment mentioned; or that in the publication of calls, schedules may have been published in which the stockholders and their respective shares were specially named and mentioned.

If due publication was denied, the onus would be on the plaintiffs to prove the calls duly made on the defendant; and if it appeared they were partial, calling only upon him individually and omitting the other stockholders, it might be insufficient to support the averment as made. But I think the averment itself sufficient in substance and form, whatever proof might be necessary to establish it. *The Sheffield Railway Company* v. *Woodcock* (7 M. & W. 384), Parke, B.; see *South-Eastern Railway Company* v. *Banner* A. & E. 497).

1st plea, the argument of Cowling and rejection of the plea. 5 Rail. way Cases, 275; *Newry and Enniskillen Railway Company* v. *Edmunds*, and 2 Ex. R. 118, S. C.—not a condition precedent under 8 & 9 Vic. ch. 16; and that the same application should be made to each shareholder for the same portion of the sum originally subscribed.

This disposes of the cases against Boswell and Beatty.

As to the case against Ruttan. The 6th plea is disposed of above, No. 2. The 10th plea is clearly bad. It does not deny any fact alleged, or state any new fact, but merely invites the reference of a point of law to the jury, as an issue to be tried.

As to the 12th plea, the first, second and third grounds may be taken together. The case of 13 M. & W. 30, 1 D. & L. 969, same case, shew that the plea is distributive and not too large. (See also 2 C. & J. 488; 1 Dow. 572; 3 A. & E. 741; *Vivian* v. *Jenkins et al.* 10 M. & W. 634; *Eden* v. *Turtle*, 4 U. C. Q. B. R. 207; 5 U. C. Q. B. 575.) The fourth is the main point. The act, sec. 4, does not require the notice of calls to be published in four newspapers, as averred; but in two or more, published in the then Midland District. No objection, however, has been made on this head, and the reason of the double averment is obvious. The substance of it is that the calls were duly published according to the requirements of the statute. The principal question is, whether this plea is bad, as amounting to or traversing what would be put in issue by the general plea of never indebted. The statute 1 Wm. IV., ch. 12, sec. 4, enacts that the amount of any shares subscribed for shall be due and payable to the plaintiffs in the manner following: ten per cent. on each share subscribed shall be payable to the company immediately after the stockholders shall have elected the number of directors thereinafter mentioned, and the remainder by instalments of not more than ten per cent. at such period as the president and directors shall from time to time direct and appoint for the payment thereof: *Provided always*, that no instalment shall be called for in less than forty days after public notice shall have been given in the *Upper Canada Gazette*, and in same two or more newspapers published in the Midland District. We have held that for such calls, when duly made, an action of debt will lie under the statute. But whether the obligation is to be regarded in the light of a mere simple contract, is not a settled point. In the *Edinburgh Railway Company* v. *Hibblewhite* (6 M. & W. 713), Lord Abinger said—"This is an action of debt founded on the original contract between the parties—namely, to pay upon the calls being duly made. The clause which gives the form of declaration proceeds upon the contract between the parties." Is not this therefore debt on simple contract? (See also 8 Dow. 802, S. C.) But afterwards, in giving judgment, he seems to have expressed a different opinion; for after saying that the declaration was bad at common law, and that to make it good the act of parliament must be referred to, he said, the case then falls within the fourth rule,

which requires the defendant in actions of debt, other than simple contract, to deny some particular fact alleged in the declaration. Our own rule (E. T. 5 Vic.) Cameron's Rules, p. 56, No. 3, is similar to that referred to by Lord Abinger. After abolishing the plea of *nil debet*, it provides that in actions of debt on simple contract, (other than on bills of exchange and on promissory notes) that the defendant may plead that he never was indebted in manner and form as in the declaration alleged, and that such plea of non assumpsit, which (p. 53) operates only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. (*a*) It also provides, that in other actions of debt in which the plea of *nil debet* had been previously allowed (including those on bills of exchange and promissory notes), the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance. The declaration in the present case, though framed in debt, doesnot any where expressly allege that the defendant was indebted to the plaintiffs, as is done in ordinary actions of debt on simple contract and in the declarations for calls, as authorized by the statutes in England, and to which the plea of never indebted is therefore peculiarly applicable. But it states a series of facts, whereby, as a legal consequence, the defendant became indebted by act of parliament, as expressed by Tindal, C. J., in 6 Bing. N. S. 136–7.

It is in this view questionable whether the plea of never indebted be admissible without infringing on the new rules above mentioned; and if not admissible, it follows of course that the plea in question is unexceptionable. The plea of never indebted has however been usual to declarations of this kind, and to all the counts, although the second and third contain additional averments, not in the first—namely, the due making and publication of calls, the very thing traversed by the plea now under consideration, and the plea of *nunquam indebitatus* has been treated as traversing and putting in issue every material allegation contained in each count of such declaration. If I was quite satisfied of its inadmissibility, it would at once dispose of the demurrer; but I am not so satisfied thereof as to feel warranted in determining against it without having the point fully argued. See the *Great North of England Railway Company* v. *Biddulph*, (7 M. & W. 243), where *nunquam indebitatus* was pleaded to the third and fourth counts, but not to the two first, which were special, like those before us. For the purposes of the

(*a*) See Harrison's C. L. P. Act, p. 673.

present case, I shall assume that it may be pleaded, and that its effects would be to deny the due publication of calls, in manner and form alleged; that allegation being treated as a condition precedent to the defendant's liability to be sued for the calls, although their publication is only enjoined by a proviso at the end of the 4th section of the act. It has not been contended that such proviso comes within the class of cases which distinguish between an exception in the enacting clause of a statute and a separate proviso.—*Spieres* v. *Parker*, (1 T. R. 141; 8 T. R. 542; Foster, 430; 1 East. R. 644; 9 B. & C. 836). And, treated as a proviso annexed to the matter of contract, it would, according to the usual construction of agreements *inter partes*, be considered conditional. In *Smart* v. *Hyde*, (8 M. & W. 728,) Parke, B., said, "If the matter relating to the notice in that case had been by way of proviso upon the warranty, it might perhaps have been necessary to be stated in the declaration; but he declined giving an opinion on the point." And see *Harrington* v. *Wise* (Cro. El. 486), at the end.

In the case of *Smart* v. *Hyde*, a complete obligatory undertaking (a warranty) was to cease, or be considered as complied with, unless notice of unsoundness (of a horse sold) was given by twelve o'clock the next day. Here no liability accrued, even *prima facie*, unless the calls were duly published. I look upon it therefore as a condition precedent material to be alleged, and not a mere matter of defence to be pleaded.

No debt arose from the mere act of subscribing; but when the calls were made, each instalment might be regarded as *debitum in præsenti solvendum in futuro*. In the *Aylesbury Company* v. *Mount* (4 M. & G. 665), Tindal, C. J., said it might be suggested that a party who becomes a shareholder at once becomes liable to pay all the unpaid instalments that may be called for by the directors, and that consequently, when an instalment is called for, it is *debitum in præsenti solvendum in futuro;* and that the shareholder at the time the call was made, being debtor, should therefore be the party to pay. It may be proper to consider then, when a call can be said to have been made as distinct from the period when it becomes payable; for, among other things, the time when a call is made is material, as respects the power of stockholders at that period to transfer their shares afterwards, before they become payable or are paid. The statute 1 Wm. IV., ch. 12, sec. 6, renders the shares transferable on the books of the company after the first instalment shall have been paid. Any further restriction must depend upon by-laws made under sec. 10, or on general principles governing the transfer of stock in such institutions. In many of the imperial statutes, it is regulated by express enactment. (See the notes to the above cases.)

In the *Sheffield Railway Company* v. *Woodcock* (7 M. & W. 574), Parke, B, at p. 584, said, the notice in the newspapers, as it seemed to him, was the call: "It is equivalent to a demand on each proprietor personally." See also his language in delivering the judgment of the court. See *Great North of England Railway Company* v. *Biddulph* (7 M. & W. 242). Again, in *Shaw* v. *Rowley* (11 Jurist, 911; 16 M. & W. 810) he said, the call is not made until the resolution of the directors, for such call is given to the shareholders or proprietors of the company; and (S. C. 2 Ex. R. 119; 12 Ju. 101) that a circular sent to every shareholder in a railway company, informing him that the directors had resolved on making a call, constituted a call in that case.

So far as material to be determined, it seems therefore that a call is considered to have been made whenever it is published as required in the proviso in sec. 4, though not payable for at least 40 days afterwards. And the distinction between the making and publishing a call, as an act done, and its becoming payable at the end of 40 days afterwards, should be observed. The proviso is that no instalment shall be called for in less than 40 days after public notice thereof shall have been given; which may mean, that the 40 days' notice of the intention to make a call should precede its being made, and not that when made, 40 days notice of such call should precede its becoming payable. The latter I believe, is the sense in which such provisions have always been understood; but in whichever light viewed, the present plea is not that the calls mentioned in the second and third counts were not made, but that public notice of such calls was not duly given as therein alleged.

In many of the adjudged cases in actions for calls, in the concise mode of declaring, the plea that the defendant was not a proprietor has been allowed to be superadded to that of never indebted, as if the latter did not embrace the former; while a plea denying due publication of the calls has been sometimes refused as included in the ground plea of *nunquam indebitatus*, though at other times admitted. Now the statutes authorising the short form of declaring uniformly require the plaintiffs to prove, both that the defendant was a proprietor and that the calls were duly made, &c., and I do not perceive why both facts are not equally traversed and put in issue by the plea of never indebted, if that plea be admissible at all; respecting which no question seems to have been raised, unless in the case of the *Edinburgh, Leith and New Haven Railway Company* v. *Hibblewhite* (6 M. & W. 707; 8 Dow. 802)

Had the present declaration been framed in assumpsit, stating the defendant's promise as special to pay the instalment upon 40 days' pub-

lication thereof, as required by the act, with an averment of due performance, the plea of non-assumpsit would have only denied the express contract alleged, &c., and would not include a traverse of the alleged publication of the calls; and if the plea of never indebted is not to have a more extensive operation, it would not deny that averment. The plea however, being, that the defendant was never indebted, and not merely that he made no such contract, it would seem to deny all material allegations in the declaration; and so the analogy between the two general pleas in assumpsit and debt would not strictly hold, which is another argument against the admissibility of the general issue to declarations like the present.

In England, leave to plead double must be previously obtained from the court or judge; while here a defendant is allowed to plead several pleas without such permission, by the statute 2 Geo. IV., ch. 1, sec. 7. But whether the plea in question be a single one, or one of several, can make no difference on demurrer, as the same objections may be equally taken to it when pleaded jointly or alone, and its validity must be judged of without reference to other pleas. The objection to it is, not that it is pleaded with the general issue, but that it amounts to the general issue; and which ought to have been pleaded in its place and alone, allowance of the two pleas together, or the rejection of one of them, in England, is only therefore material as implying the impression of the courts or judges there that the plea denying publication would probably be deemed invalid on demurrer. See *Sutherland* v. *Pratt* (7 Jurist, 180), where a plea was allowed, but afterwards held bad on demurrer. See also 7 Jurist, 261; 11 M. & H. 296; 12 A. & E. 497.

Pleas are open to exception, as amounting to or involved in the general issue, on three distinct grounds:

1st. As directly or in a negative form traversing one or more of several material allegations, which the general issue would equally traverse in common with the others; or

2ndly. In traducing new affirmative matter, amounting to an argumentative denial of the whole, or portions of the declaration material to the plaintiff's case; or

3rdly. Stating affirmative matter admissible in evidence under the general issue, to rebut the evidence of the plaintiff in support of the allegations traversed by the general plea; in other words, pleading matter of evidence only, not traversing or denying anything expressly, but indirectly controverting the plaintiff's case, and not confessing or avoiding. The case before us is of the first description, and a direct traverse. In *Hayselden* v. *Staaf* (5 A. & E. 153), Lord Denman, C. J., said,

that although a defence might be gone into under the general issue, it did not necessarily follow that the defence might not be specially pleaded on the record, referring to *Carr* v. *Hinchliff* (4 B. & C. 547) as an instance. Again, he said, there is a great distinction between the case of a plea which amounts to the general issue, and a plea which discloses matter which may be given in evidence under the general issue; that under the latter the various things (previously) enumerated as performance or excuse thereof, &c., might be given in evidence under the general issue independently of any of the new rules, but it was incorrect language to say that these things amounted to the general issue —they only defeated the contract; but what, in correct language, might be said to amount to the general issue was, that for some reason specially stated, the contract did not exist in the form in which it was alleged; and where that was the case, it was an argumentative denial of the contract, instead of being a direct denial, which, according to the correct rule of pleading, was not allowed. He also referred to *Edmunds* v. *Harris* (2 A. & E. 414) as doubted in *Taylor* v. *Hilary* (1 Cr. M. & R. 741; 4 Tyr. 373,) and in *Knapp* v. *Harden* (1 Gale, 47); also in *Jones* v. *Nanney* (333), virtually overruling it. He also mentioned *Jolly* v. *Neish* (2 Cr. M. & R. 358, 5 Tyr. 625, and 1 Gale, 227); and held the plea in the principal case bad, as augmentatively denying the contract alleged.

In *Leaf* v. *Tuton* (10 M. & W. 396), overruling *Maggs* v *Ames* (4 Bing. 470), Parke, B., said "The case differed from those in which the contract was avoided by the statute or common law, for some matter which (admitting a color of action) was the subject of proof on the part of the defendant—such as usury, fraud, gaming, infancy, coverture, &c. —none of which amounted to a denial of the contract, but to a confession and avoidance, and should be specially pleaded under the new rules, though admissible under the old system under the general issue, which then amounted to a plea that there was no cause of action, or that it had ceased before suit; but they did not amount to the general issue—that is, to an unqualified denial of the facts alleged."

In *Sutherland* v *Pratt* (11 M. & W. 312), Parke, B., said the plea was bad at common law. "It is true it does not resemble most of the pleas which amount to the general issue, which usually contain new matter, and conclude with a verification, and are bad as argumentative denials; but this is bad on the ground that the law had provided an appropriate mode of denial of particular facts, which must be followed, and that in order to avoid long records (Hob. 127), citing various instances). In *Warner* v. *Wainsford* (Hob. 127), it is said, and has

been formerly considered the proper course, not to demurrer to such like pleas, but to move the court to strike them out (see *Ward* v. *Blunt*, 1 Leo. 178); that the reason for pressing the general issue was not for insufficiency of the plea, but not to make long records where there was no cause." Another reason is given by Alderson, B., in *Gough* v. *Bryan* (2 M. & W. 773). He said the reason of the rule was, that by the general issue you give the plaintiff an opportunity of several replications, whereas by pleading the same defence specially, you drive him to one replication, taking issue on one fact. This of course can only apply where new matter is affirmatively pleaded, the whole of which would require to be proved at the trial, and which the plaintiff might repel by counter evidence, and thereby have a benefit equivalent to two or more replications, instead of being bound to traverse in a single replication a portion only of the various allegations contained, in making up the whole plea or defence; and the learned baron added, "If indeed the general issue raises one fact only, that reason does not apply;" nor can it apply if the defendant traverses in direct terms one only of several material unconnected allegations contained in the declaration.

In *Carr* v. *Hinchliff* (4 B. & C. 547), and the cases there cited, the exceptions are noticed of admissible special pleas where they confess and avoid or answer the declaration by what is termed matter of law, although the same facts might be proved under the general issue. On the other hand, several instances of matter pleaded both negatively and affirmatively, constituting only argumentative denials of the material averments, or the gist of the declaration or count, and therefore bad, are mentioned by Parke, B., in *Sutherland* v. *Pratt* (11 M. & W. 312); and the modification of the old plea of *nil debet*, "that the defendant does not owe," &c., by the new rules (Cam.'s Rules, p. 56, Nos. 2 & 3), by substituting the plea of never was indebted," &c., and the direction to deny specially (in No. 4, ib. p. 56), together with the whole scope and spirit of the new rules, and the right to plead double without leave of the court (stat. 2 Geo. IV., ch. 2, sec. 7), combine to render the older cases of difficult application to the present question. Perhaps as applied to a mere traverse of part of the declaration, a correct discriminating rule is suggested in what Parke, B., said in the last mentioned case, at page 413, where, after noticing the action of debt for rent, in which *non est factum* or *non demisit* and *rien in arrere*, are permitted, together with the plea of *nil debet*, (citing Gilb. C. P. 61), and confessing the difficulty of reconcilling all that had been previously cited, and of the possibility of the above pleas, in debt for rent, being formal modes of traverse peculiar to that action, he adds, "But whether that be so

or not, there is no authority for holding that each fact constituting one entire proposition—as, that a valid contract was made between the defendant and plaintiff—can be made the subject of distinct traverse;" an observation emphatically applicable to the new rule determining the effect of the general issue in actions of assumpsit or of debt, when the analogy holds. In Gilb. Histy. C. P. 61, it is stated that the pleadings in other actions were settled conformably to what was done in the assize; for they gave the defendant, if it were a matter of fact, the liberty of pleading the general issue, or of traversing any material point of the declaration, but he could not plead a plea that amounted to the general issue were only facts on which the issue might be turned in evidence, and therefore were not the issues of fact to be returned to the court, but matters of evidence to be determined by the jury, and consequently not a good plea, because they drew to the examination of the court what was proper to be determined by the jury. But they gave the defendant leave to traverse any material point in the plaintiff's declaration, in order to bring that one single point in issue, and to which they might apply the evidence alone—instancing the case of debt for rent referred to by Parke, B., in *Sutherland* v. *Pratt*, 11 M. & W. 313; and see Ba. Ab. Pleas, G. 3; *Long* v. *Lee*, 4 U. C. Q. B. R. 377; Try. Pl. 80, 243, 140, 251, 258.

The rule of pleading is, not that the issue must be joined on a single point of defence.—1 Bur. 316; 2 B. & C. 408; 4 B. & C. 547; *Isaac* v. *Farrer*, 1 M. & W. 98, per Lord Abinger.

The cases of argumentative denials by pleading new affirmative matter, or matters admissible in evidence under the general issue, are such as—*Warner* v. *Wainsford* (Hob. 127), administratrix debt; plea, retainer for plaintiff's demand; demurrer, because defendant should have pleaded *plene administravit* (held good); and as some matter in law and in the note (*a*); and many cases are collected in the note to Stephens' Pleading, 465; last edition.

Instances of negative pleas amounting to argumentative traverses, are—

(*a*) *Jolly* v. *Neish*, 5 Tyrh. 625, 4 Dow. 248; *Gregory* v. *Hartnoll*, 1 M. & W. 183; *Worrall* v. *Grayson*, 1 M. & W. 166; *Jones* v. *Nanney*, 1 M. & W. 333; *Hayselden* v. *Staaf*, 5 A. & E. 158; Morgan Petren, 3 Bing. N. S. 437; *Smith* v. *Dixon*, 7 A. & E. 1; *Cleworth* v. *Pickford*, 7 M. & W. 315; *Hill* v. *Allen*, 2 M. & W 283; *Brind* v. *Dale*, 2 M. & W. 775; *Payne* v. *Haly*, 5 M. & W. 599; *Prentice* v. *Elliott*, 5 M. & W. 606; *Collingbourne* v. *Mantell*, 5 M. & W. 289; *Leaf* v. *Tuton*, 10 M & W. 393; *Dicken* v. *Neale*, 1 M. & W. 556; *Francis* v. *Baker*, 10 A. & E. 642; *Maude* v. *Nesham et al*, 3 M. & W. 502; *Cotton* v. *Browne*, 3 A. & E. 312; 4 N. & M. 831 S. C.; *Jacobs* v. *Fisher*, 1 C. B. 178; *Kemble* v. *Mills*, 1 M. & G. 757; *Redmann* v. *Smith*, 8 Jur. 711.

10 Hib. p. 16; Trespass to a warren—that there was no such warren; or to a close, &c.—*non depavit herbas.*

Debt for a horse sold—that defendant did not buy.

Gough v. *Bryan*, 2 M. & W. 772: Case for negligence—special traverse of the negligence.

Bridge v. *The Grand Junction Railway Company*, 8 M. & W. 245.

Green v. *Pope*, 1 Lord Raymond, 125; case for false return—that it was true.

West v. *West*, 1 Lord Raymond, 647; Case for false return—that defendant was not officer.

Taylor v. *Sea*, 2 Lord Raymond, 958; Assumpsit—general performance.

And see Doc. & Stu. 272, ch. 53.

The above cases are cited by Parke, B., in 11 M. & W. 313; and it will be observed, that to a certain extent, some of them, though virtually in the negative, are framed in an affirmative form—as the three last in Lord Raymond.

The cases more immediately applicable are—*London and Brighton Railway Company* v. *Wilson and Fairclough*, 6 Bing. N. S. 135, in which the defendants were allowed to plead "never indebted, and not a proprietor," but not that due notice of the calls had not been given; and *London and Brighton Railway Company* v. *Fairclough*, in which the court set aside a judge's order allowing pleas of forfeiture in addition to never "indebted and not a proprietor." These cases were followed by the Q. B. in S. of *England Railway Company* v. *Hibbleswhite*, 12 A. & E. 497, allowing "never indebted and defendant not a proprietor," but rejecting that there was no notice of calls; *The Aylesbury Railway Company* v. *Mount*, 4 M. & G. 651; 5 Scott, N. R. 127, S. C. 2 Dow. N. S. 143; 7 M. & G. 798; S. C. 8 Scott, N. R. 586; *Smart* v. *Hyde*, 8 M. & W. 723—to be compared with 2 M. & W. 775, and 5 A. & E. 153; *Kemble* v. *Mills*, 1 M. & G. 757.

The case most in point is *The Edinburgh, Leith and New Haven Railway Company* v. *Hibbleswhite*, 6 M. & W. 707; 8 Dow. 802, S. C. Debt for calls, under the statute 6 & 7 Wm. IV., ch. 121, secs. 49 & 50, in the brief form: Pleas—1st, never indebted; 2nd, no notice of the calls, concluding with a verification, with two other pleas. Demurrer, as amounting to the general issue, and not concluding to the country. The court held the second plea bad, for not concluding to the country, taking no notice of the other ground, though pressed in argument. In reference to the second plea, and the want of any averment in the declaration that notice of the calls was given, unless by implication, in relation to the statutes, Lord Abinger, C. B., said, "In order

to make the declaration good, the act must be referred to; and it must be taken that the declaration includes all the facts necessary to be proved, and among them the averment of notice to the defendant. The case, then, falls within the fourth rule, which requires the defendant, in actions of debt other than simple contract, to deny some particular fact alleged in the declaration. If the declaration had contained an averment of notice that would have been admitted unless denied by plea (5 Bing. N. S. 686), regarding it, perhaps, as matter of inducement or breach of contract. The result is, that the plea ought to have concluded to the country, and is bad on that special ground."

Alderson, B., said the averment that the defendant was not indebted, must be considered as impliedly denying all those facts which the statute has required to be proved as conditions precedent to the right to recover; but the proper mode of pleading is to traverse the allegation in terms.—7 M. & W. 243, already mentioned.

Newry and Enniskillen Railway Company v. *Edmunds* (2 Ex. 119.) Debt for calls under 8 & 9 Vic., ch. 16, sec. 26, the defendant pleaded "never indebted," and also pleas denying that defendant was the holder of the shares, and denying that the calls were made, on which issue was joined. So in *The Shropshire Railway Company* v. *Anderson* (13 Jur. 175), debt for calls, under the statute 8 Vic. ch. 16, sec. 26, Rolfe, B., allowed three pleas similiar to those above, to be pleaded, and refused two others, which the court afterwards refused to add. The case in 6 M. & W. 707 appears to me quite in point, and the course followed in still later cases is quite consistent therewith; and whatever be the true ground of that decision, taking it to approve of the plea when concluding to the country, I must say I think the correct rule to be deduced from all the cases is contained in what is laid down in Gilb. C. P. 61, and said by Parke, B., in 11 M. & W. 312, taken in connection with the new rules—which is, that in a declaration framed like the present, no single fact constituting a part only of one entire proposition can be singled out and traversed either directly or argumentatively, but that collateral or independent allegations, whether constituting matter of inducement or matter subsequent, as performance of a condition precedent, may be denied singly, and consequently the alleged public notice of the calls may be traversed in terms. In the absence of any express authority, of course this conclusion is adopted with hesitation and reserve, but it seems to me to conflict with no case or settled rules of pleading, and to be consistent with reason and the theory of pleading, and the new rules.

I think therefore, judgment should be against the demurrer.

McLEAN, J., and SULLIVAN, J., concurred.

MARMORA FOUNDRY COMPANY v. DOUGALL.

Incorporated Company—Action against shareholder for calls—Pleading.

(C. P. M. T., 14 Vic.)

Process issued 6th April, 1850.

Declaration dated 5th September, 1850, in an action of debt for £37 10s.

[The declaration contains three counts similar to those in the three former cases.]

The pleas are—1st. That the defendant never was indebted in manner and form as in the declaration alleged, concluding to the country, and issue.

2nd. That the plaintiffs induced the defendant to subscribe for the said stock by fraud and covin.

3rd. That after subscription and default, &c., at a general meeting of the directors duly elected, they elected to forfeit the said stock for which the defendant had subscribed, as in the declaration mentioned, and did forfeit the same, and the same became forfeited to the plaintiffs, and that the defendant had notice thereof, and acquiesced therein, of which the plaintiffs had notice.

Replication.—1st. Similiter to first plea.

2nd. De injuria to second plea and issue.

3rd. That the directors did not elect to forfeit the said stock, nor did they forfeit the same or any part thereof, *modo et forma*, &c., concluding to the country and issue.

This cause was tried before Mr. Justice Sullivan, at the last Belleville assizes, when the plaintiffs proved—

1st. The signatures of Peter McGill and Anthony Manahan to a paper or notice, as follows:—"According to the 3rd section of the 12th chapter, first William the Fourth, for the purpose of opening books of subscription for the stock in the Marmora Foundry Company, we the surviving persons, by the said act authorized, hereby direct and appoint that books of subscription be opened at the following places, and by the following persons, on the dates therein mentioned: at Belleville, on the 17th October, by M. Sawyer, Esq."—with other places and names added, but no year mentioned. That after a public meeting, held in 1848, this paper was drawn up and signed by Mr. Manahan; that it was then transmitted to Mr. McGill, at Montreal, and within a week or ten days returned, signed by him; that Hetherington (named in the act) was dead; that the book produced was opened at Sawyer's, at

Belleville, on the 17th of October, and that other books were opened at other places, including one at Cobourg, opened the 17th October, 1848, in which William Weller subscribed for ten shares.

2nd. That defendant's signature, on the third page of the book produced, which was headed "A subscription list of stockholders of the Marmora Foundry Company, proposed to be established by virtue of and under authority of a late provincial parliament of Upper Canada, passed the 16th of March, 1831, in the first year of the reign of his late Majesty King William the Fourth, chapter 12; and the undersigned hereby promise to pay the amounts set opposite to their respective names, to the party hereafter authorized to receive the same, in such instalments as are authorized by the statute, after the election of the directors by the stockholders shall have taken place, in accordance with the provisions of the enactment referred to—the subscription being as follows:

"B. Dougall, solicitor, Belleville—No. of shares, 10—£125," the date not being inserted or known, nor whether it was before or after the consent of McGill and Manahan had been obtained as aforesaid.

3rd. That upwards of £20,000 of stock was subscribed for; after which a notice was drawn up for publication, as follows:

"Marmora Foundry Company. Notice.—Whereas upwards of £20,000 has been subscribed in the Marmora Foundry Company; we do hereby give notice that the first election of directors in the said company will be held in the court-house in the town of Belleville, on Wednesday the 27th day of December next, at the hour of two o'clock p.m., in accordance with the provisions of the act 1 Wm. IV., ch. 12; of which all stockholders are hereby required to take notice. Belleville, November 18, 1848. Signed B. Flint, jun.; G. Benjamin; Joseph Vannorman; E. Murney; E. J. Levisconte; P. Robertson;" all of whom were subscribers to stock of the company.

4th. That defendant in person then admitted in writing the giving and publishing of the respective notices mentioned in the declaration in this cause, and that the same were given and published respectively, as stated therein, in the respective newspapers and gazettes and at the times in the said declaration mentioned.

5th. It was then proved that on the 27th December, 1848, Joseph Vannorman, William Weller, Nelson G. Reynolds, Peter Robertson and Robert Reid, were duly elected directors, at the court-house in Belleville, each of whom was a subscriber to the number of ten shares at least; also that five directors were regularly elected in August, 1849, and on the first Monday in August 1850.

6th. The minute book of the plaintiffs was produced, and entries proved to have been regularly made therein read, and showing a call on the 20th April, 1849, of ten per cent., payable on the 5th June, 1849; and another on the 25th September, 1849, of ten per cent., payable the 10th November, 1849; also of the second and third elections of directors, on the 20th August, 1849, and 5th August, 1850; also a resolution of the president and two directors, dated the 1st August, 1849, as follows: —"Ordered, that the names of all subscribers to the capital stock of the company, who have not yet paid any instalment on the same, be erased from the subscription stock-books of the company."

For the defendant, a nonsuit was moved on the following grounds:

1st. Because it was not shewn that the books of subscription in which the defendant had subscribed his name, were opened within two months from the passing of the act of incorporation.

2nd. Because it was not shewn that the said book was opened by authority of Thomas Hetherington, Peter McGill and Anthony Manahan.

3rd. Because it was not shewn that Thomas Hetherington made any conveyance of the property on which the works were to be carried on.

4th. Because no notice of the election of directors or of calls were proved.

5th. Because there was no proof of payment of a deposit of £1,000.

These were overruled; and the defendant then proved that a book produced had been recently found amongst the papers of James H. Lawson, Esq., deceased, who was general agent of Hetherington and McGill; and that it was the original stock-book of the company, and in all probability opened shortly after the passing of the act. A witness (McAnany) recognized the book, and proved his own signature therein as a subscriber, in 1831–2 or 3, at the request of Hetherington, who was at Belleville obtaining subscriptions. The defendant's name does not appear in this book as a subscriber. It is prefaced by a prospectus and estimate, and a copy of the act of incorporation in print, and is then headed as follows:—"The Marmora Iron Works are to be carried on by a joint-stock company, according to the act of incorporation hereto prefixed. We, the subscribers, take shares in the said company, subject to the said act, to the number and amount opposite our respective names, and on condition and value put upon the property as stated in Hetherington's letter, also prefixed—namely, of £15,000 currency."

Subscribers. | Names. | Residences. | Shares. | £12 10s. each. | Amount.

It contains upwards of thirty signatures, for upwards of one hundred shares in all, from one to ten respectively.

The case being then left to the jury on the evidence, they found for the plaintiffs—£12 10s. debt on each count separately, and £3 5s. 8d. damages for interest thereon, &c.

In Michaelmas term, 1850, *Eccles*, for defendant, moved for a rule to set aside such verdict for misdirection, avowedly for the purpose of paving the way to an appeal under the new rules of the Court of Appeal the points having been already decided by this court in former similar cases; and a rule nisi was granted with this view, against which *Hagarty*, for the plaintiffs, shewed cause during the same term; but *Eccles* did not appear to support it, probably considering it as only moved *pro forma*, and supposing that it would be discharged as governed by former decisions.

MACAULAY, C. J.—The facts appearing at the trial must be stated in the event of an appeal. I have therefore made a statement of the evidence, and of the points submitted at nisi prius.

1. The first point was disposed of in the case of the present plaintiffs against Murney, on demurrer, and again in the three former cases.

2. The second point was decided in the case against Murney, upon the trial of the issues. The evidence given on the defence in this case shews that Hetherington was an active party in the first opening of books and soliciting subscribers, &c.

3. The third, fourth and fifth are also disposed of by a reference to Murney's case. I think therefore, the rule should be discharged. It may also be observed that all the foregoing objections are raised under the plea of never indebted, not by special pleas, and that we are not to be understood in determining that it is open to the defendant to take such exceptions under that plea. If material, it would have been necessary to have considered that question.

MCLEAN, J., and SULLIVAN, J., concurred.

Per Cur.—Rule discharged. (*a*.)

(*a*) These cases are useful in shewing the liability of shareholders for calls upon their shares in joint stock companies. The pleadings in such and similar cases have been much simplified since the Common Law Procedure Act, 1856.

The Queen v. Hall.

Treasurer—Surety—Bond to the Crown—Liability.

In an action on a bond made by A. to the Queen, as surety for B. who was appointed treasurer of the Western district, under the statute 4 & 5 Vic., ch. 10, sec. 29, and continued in office under that statute until he was re-appointed treasurer by the municipal council under the statute 9 Vic., ch. 40, sections 7 and 8, which altered the mode of electing such treasurer. *Held*, that A. was not liable for any defalcations made by B. after his re-election by the municipal council under the statute 9 Vic., ch. 40, secs. 7 and 8, and that the bond given by A. ceased to be a security for anything done after that period.

(C. P., E. T., 15 Vic.)

Scire facias quare executionem non, upon a bond made by defendant to her Majesty on the 14th February, 1842, in the sum of £500.

On Oyer, after reciting that J. B. Baby, (therein mentioned) as treasurer of the Western district, had been required, pursuant to the statute 4 and 5 Vic., ch. 10, to give security for the due performance of his office by entering into a bond with sufficient sureties, &c., the condition was, that if the said J. B. Baby should well and faithfully fulfil, perform and discharge all the duties and services which by him as such treasurer ought to be fulfilled and performed, and should keep and render just and true accounts of all monies which he should receive, or which in anywise might come into his hands, or under his power and control as such treasurer as aforesaid, and should from time to time and at all times pay such sum and sums according to the provisions of any law or by-law then or thereafter to be in force, to the several persons entitled thereto, &c., then &c

Defendant pleaded—1st, that the said J. B. Baby remained and continued as such treasurer from the making of the said bond unto the 10th of October, 1846, and no longer, and during all that time which he so remained and continued such treasurer he performed the said condition in all things, &c.

The Attorney General in reply—that the said J. B. Baby did remain and continue treasurer of the then Western district much longer than unto and upon the said 10th October aforesaid—to wit, until the first of November 1849—concluding to the country. And as to the plea of performance, assigns for breach before the 10th October, 1846, the receipt of divers sums of money, &c., under the act for the erection of a Lunatic Asylum, which ought to have been paid to the Receiver General, but were not, &c.

To which the defendant rejoined payment, concluding to the country and issue.

At the trial, before Mr. Justice Burns at the last assizes in and for the county of York, it was admitted—

That J. B. Baby was treasurer of the Western district from the making of the bond until the first of September, 1849. That between the first of August, 1845, and the first of January, 1846, he received Lunatic Asylum rates for the year 1845, to the amount of £107 2s., 7½d., and also for balance of like rates for the previous year, £34 16s., together equal to £141 18s. 7½d., which (deducting per centage,) was paid over to the Receiver General previous to March 1846; that between first March, 1846, and first October, 1846, he received the further sum of £88 for like rates, for assessments in the year 1845: that between first October, 1846, and first September, 1849, he received like rates to the amount of £533 15s. 0d., exclusive of per centage, which has not been paid to the Receiver General, nor any part thereof by him; that the replications relate to such monies; that in October 1846, said Baby was by the district council re-appointed or continued treasurer under the statute 9 Vic., ch. 40, sec. 7, and that he did not then or at any time since give any new bond or other security to the Queen, or to any department of the government.

The bond in suit was taken under the provincial statute 4 and 5 Vic., ch. 10, sec. 29.

For defendant, it was objected—

1st. That his principal did not continue treasurer to 1st September, 1849, because the provincial statute 9 Vic., ch. 40, secs. 7 and 8, altered the mode of appointment of treasurer, and that defendant's bonds ceased to be a security for anything done after such appointment.

The case proceeded, and a copy of the new security given by defendant's principal to the district council was put in. A bond from him, and two sureties to the district council of the Western district in £2,000 and £1,000 respectively dated 9th October, 1846, conditioned that if said J. B. Baby should well and faithfully keep, and lawful application make of all monies which might come into his hands by virtue of any enactment of the Legislature of the late province of Upper Canada, or the Legislature of the Province of Canada, or of any by-laws of the municipal or district council; then, &c.

The present defendant is one of the sureties in this bond also. Also a receipt of G. Bullock treasurer, for £17 on account of, and 9s. 6½d. for the balance due on Lunatic Asylum rates up to the 31st of January, 1850. Also, a general release to said J. B. Baby, under the hand of the warden and seal of the united counties of Essex, Kent and Lambton, but in the name of the warden, on behalf of the said municipal council in consideration of £1,000 excepting a confession of judgment for

£1,000 which is the real consideration for the release—dated 8th October, 1850.

In Easter Term, 14 Vic., *Vidal* for defendant, obtained a rule calling on the Queen and Attorney General to shew cause why the verdict should not be reduced to £88, or why the verdict for the plaintiff on the first issue for £533 should not be set aside and a verdict be entered for the defendant on the points reserved at the trial—viz: whether the bond on which the *sci. fa.* is founded did not become void on the 10th of October, 1846, by the appointment of said J. B. Baby, as treasurer on that date, under the 9th Vic., ch. 40, sec. 7, by the Municipal Council of the Western district, and his giving a bond for the due performance of his office to the said council, and that it was his duty to, and he did pay to the credit of the Western district all moneys received by him for Lunatic Asylum rates, from said 10th October, 1846 to the time he left the office of treasurer.

MACAULAY, C. J.—The question is, whether the defendant, having become surety by a bond to the Queen for Mr. Baby, as treasurer of the Western district under the statute 4 and 5 Vic., ch. 10. secs. 29 and 30, continued liable for moneys received by his principal, who continued treasurer under that statute until he was appointed treasurer by the municipal council under the statute 9 Vic., ch. 40, secs. 7 and 8.

The statute 4 and 5 Vic., ch. 10, sec. 29, vacated the office of treasurer previously appointed by the justices of the peace under former acts, and authorized the Governor to appoint a treasurer in each district, under the great seal, to hold during pleasure; such appointment to be made after the person named by the Governor should have first given good and sufficient security for the due execution of the office of treasurer, and for the faithful accounting of all moneys which might come into his hands by virtue of the said office. Section 30 made it his duty to receive all moneys raised under any by-law of the district council, and all moneys which under any act of competent legislative authority should be directed to be paid to or received by him, and to apply and account for the same as prescribed by such by-law, or act of legislative authority, &c.

4 and 5 Vic., ch. 91, regulates the taking of securities from all officers entrusted with the receipt of public moneys. The statute 9 Vic., ch. 10, sec. 7, passed the 9th June, 1846, enacted that at the first meeting of the district municipal council, after the passing of that act, a district treasurer should be selected by a majority of the votes, notwithstanding the 29th section of 4 and 5 Vic., ch. 10, and should be subject to re-election every three years; who should have all rights

and powers which by any enactment then in force might appertain to any district treasurer appointed before the passing thereof, not inconsistent with that act. By section 8, any treasurer selected by the provisions of that act, before he entered on the duty of the said office, should give security for the safe keeping and lawful application of all moneys which might come into his hands by virtue of any enactment of the Legislature of Upper Canada, or of the province of Canada, or of any by-laws of the municipal or district council, and that such security should be, the treasurer in £2,000 and two sureties in £1,000 each, to be approved of by the district council.

It does not state *to whom* the bond is to be given (*vide* 12 Vic., ch. 81, sec. 171, and 13 and 14 Vic., ch. 67, sec. 60).

It appears that upon the same individual who was treasurer under the 4th and 5th Vic., ch. 10, sec. 29, and had continued such until the meeting of the district council under 9 Vic., ch. 40, sec. 7, being appointed by such council, he gave security by bond in £2,000 with two sureties in £1,000 each, dated 9th October, 1846, to such district council. The defendant being security in that, as well as on the bond on which this *sci. fa.* is brought.

Perhaps the bond lastly given, ought to have been made to the Queen, and if it had, I apprehend it would have superseded the former, and as it is would seem to amount to the same thing.

The plea is not perhaps well framed to meet the point of the defence, because the defendant's principal did in fact continue to be treasurer after the 10th October, 1846, though not under the same appointment but an independent and new one. The question desired to be raised is, whether he so continued in relation to the binding effect of this bond upon him and his sureties. The last appointment superseded the former, and he thereupon ceased to be treasurer under the commission granted by the Governor under the 4 and 5 Vic., ch., 10, sec. 29, and became such under the selection of the Municipal Council. The appointment of the Governor during pleasure ceased when he had no longer power to continue it, and another duly authorized power appointed to the office.

The sureties under the last bond would not be liable after a re-election of their principal by the district council at the end of three years.

On reference to the cases cited and others, I must say, I feel bound to hold the defendant not liable after the 10th October, 1846; consequently, that the only defalcation he is bound to make good is the £88 in arrear at that period. The position of his principal, and indeed his own position, was altered, and the treasurer became accountable to another party under another appointment.—*Farr* v. *Hollis*, 9 B. & C. 315.

It is not contended that a bond to the Queen being a *quasi* record makes any difference, or that any exists between the Queen and subject. Nothing has been rested on any peculiar ground arising from the prerogative of the sovereign as distinguished from a subject, and I am not aware that any exists, taking the question of discharge or exoneration of a surety under the circumstances relied upon in this case.

McLEAN, J.—On the trial of this cause, certain admissions were put in. The bond was given under the Municipal Corporation Act, 4th & 5th Vic., ch. 10, sec. 29, which took away from the justices of the peace in the several districts the power of electing the district treasurers, and declared that all previous appointments of treasurers should be vacated from and after the first of January 1842, from which period the power of appointment was vested in the Governor of the province, and the offices were to be held during pleasure, by an instrument to be issued under the great seal, after security given for the due performance of the duties. The four following sections prescribe the duties of treasurers and their emoluments.

The act 9th Vic., ch. 40, sec. 7, conferred on the several District Councils the power of appointing the treasurers, and the 8th section prescribes the amount of security to be given for the safe keeping and the lawful application of *all moneys which may come into their hands by virtue of any enactment* of the legislature of the late province of Upper Canada, or of any by-laws of the Municipal or District Council. The security to be by such treasurer in £2,000 and two sufficient sureties to be approved of by the District Council in the sum of £1,000 each.

A bond of the defendant, dated 9th October, 1846, with the same persons as sureties as in the former bond to the Queen, was put in by the defendant; and it appeared in evidence that Mr. J. B. Baby was appointed treasurer under the act of 1846, on the 10th October 1846, and re-appointed on the 10th October, 1849, and continued to act as treasurer until January, 1850. It was proved that of the monies collected for Lunatic Asylum rates prior to October, 1846, a sum of £88 was still unpaid, and that a much larger amount received while J. B. Baby was in office as treasurer after that period had not been paid over or accounted for to the Receiver General. The question then is, whether the defendant is liable on his bond to the Queen for moneys so received by the treasurer under his appointment by the District Council. The defendant now moves, pursuant to leave reserved at the trial, to reduce the verdict to the sum of £88 and to set aside the verdict for the Crown and enter a verdict for the defendant on various grounds taken at the trial. Mr. J. B. Baby continued to act as treasurer under his appointment from the

Governor till the 10th October, 1846, he then ceased to be under the control or subject to removal by the Governor. He was on that day elected treasurer by the District Council and gave in bonds in a larger penalty than had been required by the Government, for the safe keeping and lawful application of *all* moneys which might come into his hands by *virtue of any enactment of the Legislature of Upper Canada*, or of any by-laws of the Municipal or District Council. The statute of 1846 does not prescribe any security to be given to the Queen for moneys to be received by treasurers for Lunatic Asylum or other provincial purposes; and, from the tenor of the clause in that act requiring the security to be given and prescribing the amount, it appears to have been the intention of the Legislature that the securities to be given by treasurers to the District Councils should cover all moneys whatever to be received by them, whether provincial or local. The treasurer and his sureties entered into a bond to the council, for the safe keeping and proper application of *all* moneys under the statute, and being responsible under such bond to the council, they could not be accountable to the Queen for the *same* moneys under a bond previously given.

This case differs materially from the case of *Augero* v. *Keen et al*, executors of George Keen, deceased, 1 M. & W. 390. In the first place, the appointment of Mr. J. B. Baby in 1846, by the District Council, was not a re-appointment to office; it was the first appointment made by the council and though the fact of the office having been previously held by the same party, may have influenced the council to continue him in the office, it was made independently and without reference to the former appointment by the Governor. But, even if it could be regarded as a re-appointment, the bond was not, as in the case referred to, to secure all moneys received by virtue of the appointment from the Governor, or of any re-appointment to the office of treasurer. The recital shews that the bond was required under the statute 4 and 5 Vic., ch. 10, and was to be in force so long as J. B. Baby continued as *such* treasurer, liable to be removed at the pleasure of the Governor. The defendant might be quite willing to be the security of a person appointed treasurer under such restrictions, but he might be unwilling and could not be called upon to extend his security farther in behalf of the same person, because such person happened to be chosen to fill the same office by a totally different authority.

The case of *Bamford et al* v. *Joseph Isles et al.*, 3 Ex. 380, shews that the sureties of a person elected from year to year cannot be held responsible for a longer period than one year, though continued in office by annual elections for many years, and though the terms of the bond

were for the due performance of duties "thenceforth from time to time, and at all times, so long as the principal should continue in such office." Parke, Baron, in that case says, "If the condition of the bond had contained the words," or of any re-appointment thereto, as in *Augero* v. *Keen*, there would have been an end of the difficulty; and Pollock, C. B., says, "If a party be re-appointed on different terms, that is a revocation of his former appointment." In this case, however, the former appointment was revoked by the statute, and by the act of the District Council under it on the 10th October, 1846, and the principal and his sureties can only be held responsible under their bond for moneys received up to that period. The issue as to the receipt and payment of moneys under the first appointment seems to be confined to the period during which the treasurer held that appointment, and as a certain amount was found to be due for that period, that issue is properly found for the crown. With respect to the other issue as to the continuance in office by the treasurer for a period longer than from his appointment up to the 10th October, 1846, it appears to me that it should have been found for the defendant, and that a verdict should now be entered for him on that issue if leave has been reserved for that purpose.

SULLIVAN, J., concurred. (*a*)

MCKELLAR V. MACFARLAND AND KIDD.

Common gaol—Detention of prisoner—Authority—Jurisdiction.

The gaolor of a common gaol is bound to receive into and detain in the gaol until released by lawful authority, a prisoner delivered into his custody by a constable on a charge of felony, without warrant; and may justify in an action for false imprisonment without shewing what the particular felony was with which the plaintiff was charged.

(C. P., E. T., 15 Vic.)

Process issued 31st March, 1851.

Declaration 9th April, 1851. 1st count states that defendants on the 17th March, 1851, at the City of Toronto, in the county of York, with force and arms, assaulted plaintiff and seized and laid hold of him, and with great force and violence pulled and dragged him about, and also imprisoned plaintiff and forced and compelled him to go and caused him to be conveyed in custody through divers public streets, &c., to a certain common gaol in the city and county aforesaid, and then im-

(*a*) The cases of *Eastern District Council* v. *Hutchins*, (ante p. 11) *O'Connor* v. *Clements*, (ante p. 13) *Regina* v. *Smith* (ante p. 101) may be referred to in connection with this case.

prisoned and kept and detained the plaintiff in prison without any reasonable cause whatsoever for the space of twenty hours, at the expiration whereof defendants compelled plaintiff to go in company with divers men and women of evil fame, &c., to a certain police office, &c., and there kept him detained for the space of four hours contrary to law, and against the will of plaintiff, under a false and unfounded assertion and charge that plaintiff had committed a felony, whereby plaintiff was injured, &c., and committed to pay the sum of £5 in order to obtain his liberation.

2nd count states that defendants, on the 17th March, in the year aforesaid, with force and arms, &c., assaulted plaintiff, and then again imprisoned him in a certain common gaol for a long space of time—to wit, for twenty hours, contrary to law and against the will of plaintiff, whereby plaintiff was not only greatly hurt, but also injured in his credit and reputation.

Pleas—1st. Not guilty.

2nd, to 1st count. So far as relates to the imprisonment of the said plaintiff in a certain common gaol, the said defendant Kidd says that, before and at the time when, &c., he was and is the keeper of the common gaol of the county of York, and that said gaol before and at the time when, &c., hath been and still is the common gaol and house of correction of the said City of Toronto; and thereupon it became and was the duty of the defendant as the keeper of said gaol to receive into the said gaol and keep and detain in prison all such persons as should be brought to the said gaol by any peace officer or constable of the said City of Toronto, charged with any offence or crime, and as well without as with warrant in writing, and to keep them imprisoned until removed or discharged therefrom by lawful authority; and that on the day and year in said first count mentioned plaintiff was brought in custody of said other defendant, charged with having committed a felony (the said other defendant then being a peace officer or constable in and for the City of Toronto), to said gaol, to be detained until examined touching the said offence; and that defendant as such keeper of said gaol kept and detained plaintiff in prison for a short space of time and until he was removed by said other defendant, being such constable as aforesaid, to be examined touching the said offence, as he, said defendant, so being such gaoler as aforesaid, lawfully might.

Demurrer to 2nd plea—causes assigned:

1st. That the facts therein contained constitute no answer in law to the imprisonment of plaintiff mentioned in the introductory part of said second plea, said defendant not having any authority to receive, detain

and imprison, as he states in the said second plea he has by virtue of being keeper of the common gaol aforesaid.

2nd. That the fact of the said defendant being keeper of the common gaol gave him no authority to imprison plaintiff under the circumstances stated in the said plea.

3rd. That defendant in his said second plea does not confess all the imprisonment, which he attempts to justify, and that there is no identity established between the imprisonment attempted to be therein justified and that stated in the first count; nor is it shewn that they are the same trespassers.

4th. That there is no valid or lawful reason shewn for detaining and imprisoning plaintiff for examination, touching the said offence.

5th. Or that defendant had authority under the circumstances stated to detain plaintiff without a warrant; nor is it alleged that he was brought upon a warrant or imprisoned upon any warrant whatever, the said other defendant not having any legal authority to imprison plaintiff under the circumstances without a warrant.

6th. That it is not stated by whom the charge of felony was preferred, nor the time or place when and where the same was made.

7th. That defendant has not stated in the said second plea the acts of felony charged upon the plaintiff, or the species of felony charged upon him, or the acts therewith the plaintiff was charged when brought to the said gaol, nor that the plaintiff was only imprisoned for a reasonable time for the purpose therein mentioned.

There was also another plea like the second, to which the causes of demurrer assigned were similar to those above stated.

The demurrer was assigned in Easter Term, 14 Vic., *McKenzie*, for the demurrer—*Dempsey*, contra.

MACAULAY, C. J.—The authorities seem to shew that in cases of misdemeanor, a constable is only justified in arresting without warrant upon his own view, but that for felony he may arrest upon the complaint of a third person not on oath, such person representing the facts and circumstances of suspicion; which if true constitute a reasonable ground of suspicion; or that he may arrest upon facts and circumstances within his own knowledge amounting to just cause of suspicion; and that in either event he is justified; while a private individual arresting, himself, or giving a party into custody to a constable, charged with a crime, must in his own justification plead or prove the facts and circumstances under which he acted, or on which he relies as constituting a defence.—*Mure* v. *Kaye et al*, 4 Taunt. 34; *Beckwith* v. *Philby and others*, 6 B. & C. 637; 3 Cam. 420. But as respects the keeper of the

county gaol, it appears that he is justified in receiving into prison without warrant and safely keeping till duly discharged, any person brought and delivered to him on terms by a known constable or police officer, charged by him with felony, although the nature of such felony or the circumstances of suspicion are not related.

Statute 4 Ed. III., ch. 10, enacted that sheriffs and gaolers should receive and safely keep in prison such thieves and felons by the delivery of the constables and townships, without taking anything (meaning fines and ransoms) for the receipt.

1 Hale's P. C. 589.—Where a private person hath arrested a felon or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things: 1st. He may carry him to the common gaol (2 Ed. IV., ch. 6); but that is now rarely done. 2nd. He may deliver him to the constable of the ville, who may either carry him to the common gaol (vide 4 Ed. III., ch. 10), or to a justice of the peace, &c.

1 Hale's P. C. 595 & 610.—For if a private person or constable arrest a man for felony and carry him to the common gaol (as he may do by law 13 Ed. IV., 9, and the gaoler is bound to receive him by the statute of 4 Ed. III., ch. 10), if the person or constable that delivers him acquaints the gaoler it is for felony, it is at the peril of the gaoler if he lets him escape, and yet there is no mittimus in that case, but a notice on terms. It is ruled in 10 Ed. IV., 176, that it is a good justification for a man in an action of false imprisonment to say that the plaintiff committed a felony, and shew what, and the defendant arrested him and delivered him to the constable, or he might have brought him to the gaol himself or by his servant, as is there agreed. He may carry him to the gaol, &c.—10 Ed. IV., 18.

Watchmen may apprehend night-walkers and commit them to custody till the morning, and also felons and persons suspected of felony.—2 T. R. 61; *Lawrence* v. *Hedger*, 3 Taunt. 14; *Samuel* v. *Payne et al.*, Doug. 359; Cald. 291.

Now here the plea states that the defendant was keeper of the county gaol, and that the plaintiff on the 17th March, was brought to the said gaol in custody of Macfarland, then being a peace officer and constable in and for the City of Toronto, within the county of York, charged with having committed a felony, and delivered to the defendant as keeper of such gaol, to be by him detained until he should be taken and remanded therefrom for examination touching such offence, wherefore he detained

him for a short space of time and until he was removed thence to the police office mentioned in the declaration.

The statute 12 Vic., ch. 81, sec. 12, declares that the gaol of the county shall continue, and that the gaoler, &c., shall be bound to receive and safely keep until duly discharged, all persons committed thereto by any competent power or authority of such city.

As to the several grounds stated as causes of special demurrer, I think—

1st. That the facts stated do constitute an answer in law to the imprisonment of the plaintiff mentioned in the introductory part of the second plea.

2nd. And that defendant being gaoler as stated, did give him authority to imprison the plaintiff under the circumstances stated.

3rd. The second plea only professes to justify the imprisonment of plaintiff in the gaol in the declaration mentioned, which it does. Anything beyond that, if anything amounting to a substantive or independent trespass, depends upon the plea of not guilty. I do not find where the justification agrees with the declaration in time, place and circumstances, that it is essential to add the averment *quæ sunt eadem*, or otherwise to allege the identity.

4th. Is in effect involved in the first and second causes and is answered above.

5th. And that he was justified without a written warrant.

6th. It sufficiently appears that the charge was preferred by the constable. Whether the constable had arrested the plaintiff upon the charge of some other person or on his own responsibility, does not appear. Whichever it was the gaoler was justified in taking charge of him upon the delivery of the constable charging him with a felony.

7th. I do not think it was incumbent on the defendant to state the act or species of felony, or the act wherewith the plaintiff was charged, or that he was only imprisoned a reasonable time. If justified as being gaoler, then the defence rests upon the broad ground that being keeper of the Queen's prison, and such prison being the common gaol of the county, he was authorized, if not bound, to receive all persons delivered into custody there by a known constable of any city or town or township within such county.

That the imprisonment takes place on the responsibility of the officer who committed the party, and not of the gaoler who received him, because the officer was entitled to make use of the prison as a place of safe custody, and the defendant as keeper thereof empowered to be aiding and assisting him in the premises.

Any unreasonableness or other matters *ex post facto*, that would render the defendant liable as a trespasser, should be replied.

SULLIVAN, J.—The substantial objections to the defence, set up in the second and third pleas by the defendant Kidd, are, that he was not as gaoler authorized to receive a prisoner from a constable without a warrant; or if so, that he was not authorized to detain the prisoner without communication of the particulars of the charge against him, or if he could so receive him legally, he ought to shew that the prisoner was detained only a reasonable time before he was taken before a justice, or that there was a necessity for committing him, no justice being then sitting or conveniently accessible.

According to the authorities collected in 2 Hawk. pl. c. 115; 2 Hale, 75, 76.

It seems clear that all persons whatsoever who are present when a felony is committed or dangerous wound given, are bound to apprehend the offender, and every private person is bound to assist an officer demanding his help for the taking a felon, or the suppressing an affray, or apprehending the affrayers.

The causes of suspicion that will justify an arrest by a private person not present at the commission of a felony, are enumerated in 2 Hawk. p. c. 118; and it appears by s. 15, and the authorities cited, that the person making the arrest must himself be inclined to suspect the person to be guilty whether he make such arrest of his own head or in obedience to the commands of a private person.

The case of *Samuel* v. *Payne and others* (Douglas, 359), cited in note 2, 2 Hawk. 118, shews that constables and their assistants are justified in arresting a man upon a given charge of felony, even if no felony has been committed. He that makes the charge is answerable.—Ward and Clayton, 44 pl. 76; 2 Hale 84, 89, 91. In the case of *Samuel* v. *Payne*, the rule was said by the court to be inconvenient and narrow which required a felony to have been actually committed before the officer would be justified in making the arrest without warrant; because if a man charges another with felony, it would be most mischievous that the officer should be first bound to try and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorized to examine, commit or discharge.

It appears then that a private person, and *a fortiori* a constable or peace officer, upon reasonable grounds of suspicion, may arrest without

warrant; and that a constable or peace officer may arrest a person given him in charge, or against whom a charge of felony is made. (*a*)

In 2 Hawk. 126, sec. 7, it is said, that it seems difficult to find any case wherein a constable is empowered to arrest a man for felony committed or attempted, in which a private person might not as well be justified in doing it. But the chief difference between the power and duty of a constable and private person in respect of such arrests seems to be this, that the former hath the greater authority to demand the assistance of others, and is liable to the severer fine for any neglect of this kind, and has no sure way to discharge himself of the arrest of any person apprehended by him for felony, without bringing him before a justice of the peace to be examined; whereas a private person having made such an arrest needs only to deliver his prisoner into the hands of the constable.

It is laid down by Mr. Sergeant Hawkins in the same 2nd vol. ch. 16, on Commitments, sec. 3, as follows: "It seems to be agreed by all the old books, that whenever a constable or private person may justify the arresting another, for felony or treason, he may also justify the sending or bringing him to the common gaol; and that every private person has as much authority in cases of this kind as the sheriff or any other officer, and may justify such imprisonment by his own authority, but not by the command of another; but inasmuch as it it certain that a person lawfully making such an arrest may justify bringing the party

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(*a*) A constable may arrest without warrant, on reasonable *charge* of felony *McCloughan* v. *Clayton* (1 Holt, 478); *Hedges* v. *Chapman* (2 Bing. 523); *Cowles* v. *Dunbar* (2 C. & P. 565), though he afterwards discharges prisoner without taking him before a magistrate (1 Holt, 478), and though no felony has been committed (*Ibid*). He may also arrest on a reasonable *suspicion* of felony. *Beckwith* v. *Philby* (6 B. & C. 635); *Davis* v. *Russell* (5 Bing. 354). *Semble.:* A constable is not justified in apprehending and imprisoning one on suspicion of having received stolen goods, on mere assertion of one of principal felons. *Isaacs* v. *Brand* (2 Stark, 167). Where an arrest is made by one to whom the warrant is given by a constable, and the constable is too far off to arrest, it is illegal. *Rex* v. *Patience* (7 C. & P. 775). A constable arresting on suspicion of felony must take his prisoner before a magistrate as soon as he reasonably can. *Wright* v. *Court* (4 B. & C. 596). *Semble:* he cannot justify handcuffing prisoner, unless it is necessary to prevent an escape (*Ibid.*); nor can he give a blow, unless resisted, *Levy* v. *Edwards* (1 C. & P. 40). A police officer was assaulted by the prisoner, and, returning about two hours after with assistance, attempted to arrest him without a warrant, and was again violently assaulted and wounded by the prisoner: *held*, that the apprehension was not lawful. *Reg.* v *Walker* (23 L. J. M. C. 129). A constable who acts *bona fide* believing that he is doing his duty, is, though mistaken, within the protection of 24 Geo. II. cap. 44, s. 8, and it is not a question for the jury whether the facts were such as might reasonably lead him to think he was so acting. *Gosden* v. *Elphick* (4 Ex. 445). As to notice of action, see secs. 110 & 20 of cap. 126 of the Consolidated Statutes for Upper Canada, pp. 991–995.

to the constable in order to be carried by him before a justice of the peace, was much as the statutes 1 & 2 Ph. & M. ch. 13, and 2 & 3 Phil. & M. ch. 10, which direct in what manner persons brought before a justice of the peace for felony shall be examined by him in order to their being committed or bailed, seem clearly to suppose that all such persons are to be brought before such justice for such purpose. And inasmuch as the statute 31 Car. II. c. 2, commonly called the Habeas Corpus Act, seems to suppose that all persons who are committed to prison are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate, and the constant tenor of the late books, practice and opinions, are agreeable thereto, it is certainly most advisable at this day for any private person who arrests another for felony, to cause him to be brought before some justice of the peace that he may be committed or bailed by him." (*a*)

It is no doubt the duty of a constable or peace officer who makes an arrest for felony, at the first convenient opportunity, to bring his prisoner before a justice of the peace, so that he may be bailed, discharged or committed; but supposing that he takes him in the first instance to the common gaol, the question that arises in this case is, whether the gaoler is not bound to receive the prisoner, said by the constable to be taken by him on suspicion or upon charge of felony, without inquiring into the particular nature of the charge, without knowing the person who prefers it, and without inquiring into the fact as to opportunity of taking the prisoner before a magistrate, and whether the gaoler is not bound to keep such prisoner until he is taken before a magistrate by the constable or otherwise, or until he is released upon *habeas corpus*.

The statute 4 Ed. III., ch. 10, enacts that justices of gaol delivery shall punish sheriffs and gaolers refusing to take felons into their custody, from constables and townships without being paid for such receipt.

It is said (see Hawkins, 177, sec. 9; Dalton ch. 18) that if a constable bring a felon to gaol and the gaoler refuse to receive him, the town where he is constable ought to keep him till the next general gaol delivery. But in other cases, it seems (see 2 Hale, 123, 20 E. 4 O. B. F., Imprisonment; 2 Hale, 81), no one is justified in detaining a prisoner in custody out of the common gaol unless there be some particular reason for so doing, as if the party be so dangerously sick that it would apparently hazard his life to send him to the gaol —See statute 5 H. IV., ch. 10.

In *Beckwith* v. *Philby, Wilkes and Spicer* (6 B. & C. 35), Philby

(*a*) As to proceedings necessary to be taken to obtain the writ of *Habeas Corpus*, see Archibald's Crown Practice.

was high constable of Ongar in Essex; Wilkes and Spicer were constables of the same parish. Philby seeing some reason to suspect plaintiff of having stolen a horse, arrested plaintiff and sent for Wilkes to take him to the watch-house, and on Wilkes' arrival desired him to handcuff the plaintiff. Wilkes took him to a public-house, where he remained handcuffed during the night. On the following morning, Wilkes delivered him to Spicer, who took him to a magistrate. Littledale, J., who tried the case was of opinion that the arrest and detention was lawful, provided the *defendants* had reasonable cause to suspect that the plaintiff had committed a felony. A verdict was found for the defendants, but liberty was reserved for the plaintiff to move to enter a verdict for nominal damages, if the court should be of opinion that the arrest and detention were unlawful. The Court of Queen's Bench refused to interfere with the verdict.

Now in that case neither Wilkes who detained the prisoner, nor Spicer to whom he delivered him, were the persons suspecting. Wilkes received and delivered the prisoner, and Spicer received him just as the present defendant did; and surely there can be no distinction taken against a keeper of a common gaol, which would make him liable, where these parties were held not to be so.

In *Lawrence* v. *Hedger* (3 Taunton, 14), the plaintiff, it appears, was in the City of London, stopped by the watchman, who took him to the watch-house, where the *defendant*, a beadle, was in attendance, who asked plaintiff questions about his bundle, the answers to which including suspicion, he sent the plaintiff to the gaol—the Poultry compter—not charging the prisoner in his own name, but in the name of the constable of the night, who was not in fact in attendance. The statute 10 Geo. III., for regulating the police of London, directs that watchmen apprehending persons shall carry them to the constable of the night, who shall carry them before a magistrate; and it was contended for the plaintiff that the power being given to the constable of the night only, the beadle had no authority to detain and imprison him. Mansfield, C. J., was of opinion that without the aid of this act, any watchman might detain the plaintiff and carry him to a constable, and that it would be the constable's duty to secure him, and of this opinion was the court; Lawrence, J., citing *Rex* v. *Booter*, 864, the case of an indictment against a constable for suffering a street-walker taken up by a watchman to escape. Chamber, J., quotes *Samuel* v. *Payne*, cited above, which he says was an arrest in the daytime; but in the night he says it is the especial duty of these watchmen and other officers to guard against malefactors, it is highly necessary they should have such power of detention. We should

be very sorry, he says, if the law were otherwise. Now this was a justification at common law. The plaintiff was sent to gaol; no felony was committed; the plaintiff was discharged; there was no warrant; the gaoler did not receive the prisoner from the constable who made the arrest, yet the gaoler was not even sought to be made liable—on the contrary, the conduct of all concerned seems to have met the approval of the court. See Wilson's Office of Constable, ch. 2, pl. 98, (*a*) *The Queen* v. *Tooley* (2 Lord Ray, 1296), where it was held manslaughter to kill a constable acting out of his jurisdiction, for the purpose of releasing a woman whom he had committed to prison as a street-walker.

See also *White* v. *Taylor*, 4 Esp. N. P. C. 80; *Hobbs* v. *Brunscombe* 3 Camp. 420; *Nicholson* v. *Hardwicke*, 5 C. & P. 495; *Davis* v. *Russell*, 5 Bing. 354.

If a constable, upon reasonable charge of felony or other crime for which a constable may arrest without warrant, refuse to arrest, he may be indicted and fined.

Brandling v. *Kent* (1 T. R. 60), is the most satisfactory case I can find in modern times as to the duty of gaolers. It was there held that the gaoler was bound to receive a prisoner tendered after the return day of the writ: Mr. Justice Buller observing—"Mr. Chambre has said that the gaoler would be answerable if the arrest were illegal on the face of it. I doubt that very much. It has been decided in the case of a pound-keeper (Cowp. 476), that he is bound to receive everything offered to his custody, and is not answerable, whether the thing was legally impounded or not. The gaoler was not answerable in this case. He should not have disputed the orders of the sheriff, and therefore we will not permit him to amend," &c.

An examination of the case in Cowp. 476, which is that of the pound-keeper, who was held not to be obliged to justify and not to be a trespasser, the case does not altogether bear out Mr. Justice Buller's citation; for Lord Mansfield and Ashurst, J., both take the distinction between a gaoler and a pound-keeper. The former, they say, is *prima facie* a trespasser, and must justify; and Ashurst, J., says—"A gaoler must justify, because a prisoner cannot be delivered to him without a warrant. Therefore he must state a warrant. The distinction is plain between the two cases, as Lord Mansfield states it; but I think there is abundance of authority to shew that gaolers are bound to receive prisoners from constables without warrant; the constable's charge of

(*a*) See also "A Sketch of the Office of Constable," by Adam Wilson, Esq., Q.C.

felony is the warrant. The gaoler must, it is true, plead the justification, and is not in the situation of a pound-keeper; but this does not shew that he is accountable for the want of ground for the arrest.

It was held by Lord Ellenborough, in *Wann* v. *Alexander* (3 Camp. 35), that a gaoler who receives and detains one apprehended and charged in his custody under a warrant, runs the risk of the warrant not having been executed against the true person. This may be good law, but it does not come up to the present case. The warrant directs the gaoler to receive and detain one person, and may not justify his mistakenly receiving and detaining another; but it does not appear by the pleading in the present case that there was any mistake in the identify; and the law, as laid down by Lord Ellenborough, is sufficiently hard upon gaolers, without extending the rule any further. Lord Ellenborough's ruling is said in Sewell on Sheriff, 60, to be at variance with the language of the court in the case I have cited of *Brandling* v. *Kent* (1 T. R. 60).

In addition to other causes of commitment without written warrant being held justifiable, the case of *Davis* v. *Capper* (10 B. & C. 33) is very instructive. In the judgment of Bayley, J., he cites the case of *Rex* v. *Gooding* from Burns' Justice, where the question was submitted to the judges, whether a prisoner was in legal custody for further examination merely, but with no warrant, commitment or other written authority; and their Lordships were unanimously of opinion that such a commitment for a reasonable time was good; and the prisoner was convicted and sentenced for aiding the party in custody to escape.—See also *Wright* v. *Court et al.*, 4 B. & C 596.

The case of *Rex* v. *Booter* (2 Burr. 864) is remarkable for the expression of opinion of Mr. Justice Wilmot: "I think it is a misdemeanor in the constable to discharge an offender brought to the watch-house by a watchman in the night, though without any positive charge" —the question being on an indictment against the constable for an escape. I can discover no authority or principle upon which a gaoler is entitled to refuse to receive into his custody persons tendered without warrant by constables upon a charge of felony, or which makes it his duty to inquire into the particular nature of the charge or the grounds upon which it is preferred, or to ascertain if there be a justice of the peace accessible before whom the prisoner can be taken, or to discharge the prisoner by his own authority if this be not done. The prisoner has his remedy by *habeas corpus*, if detained without a written commitment; but the case will seldom or never arise when the prisoner is not

taken before a justice of the peace or discharged before a writ of *habeas corpus* can be obtained. There is a wide difference between the power of a judge before whom a prisoner is brought upon *habeas corpus*, and the discretion of a gaoler. I am glad to be able to come to this conclusion, for otherwise it seems to me the law would cast an intolerable burden upon gaolers, and would impose duties upon them quite inconsistent with their office. Those who make the arrests and commitments are answerable for their grounds of suspicion, or for neglect of duty in not taking prisoners before magistrates.

This disposes of the substantial objections to the defendant's pleas. The formal one raised on argument—namely, that the detention is charged to be for a long space of time, and the detention justified for a short one—is not sustainable.—See *Worth* v. *Terrington*, 13 M. & W. 781. Then the pleas are as to the detention and imprisonment in the count mentioned. But the plaintiff's counsel objects that the pleas should have concluded with a formal *quæ sunt eadem*, in order to identify the imprisonment justified with the one complained of. The rule is laid down with great precision in 1 Chitty Pl. 581. When the plea necessarily states the trespass to have been committed at some other time or place than that laid in the declaration, it is proper immediately preceding the conclusion of the plea to allege that the supposed trespasses mentioned in the plea are the same as those whereof the plaintiff hath complained. But when it is unnecessary, and consequently improper to vary from the time or place mentioned in the declaration, the *quæ sunt eadem* need not be inserted. I do not see that it was necessary for the defendant in this case to vary from the time or place mentioned in the count. The defendant is charged with keeping and detaining the plaintiff in prison in the common gaol on the 17th day of March for a long space of time—to wit, for twenty hours. The defendant Kidd, confining his pleas to the detention and imprisonment in the common gaol, justifies the same—to wit, until the 18th day of March. There is therefore no necessity for departure from the time or place mentioned in the declaration, and neither is there any.

I am of opinion that our judgment should be against the demurrer, as I do not find the pleas bad for any of the causes noted in the demurrer.

McLEAN, J., concurred.

Judgment against the demurrer.

Parker and Wife v. Elliott.

Trespass—Beach—Highwater mark—Lake Ontario—Grant by Crown.

In an action of trespass for entering the plaintiff's close and digging post holes, and building a shanty, &c., and occupying the beach for the purpose of fishing. *Held*, that the Crown has the power to grant the beach to high water mark, and that the plaintiff was a trespasser, the patent having conveyed to the plaintiff the land to the waters of Lake Ontario. *Held also*, that no common law right exists to the public, to use the beach above high water mark for the purposes of fishing, when the beach has been conveyed by the Crown to a subject.

(C. P., E. T., 15 Vic.)

Trespass, *quare clausum fregit.*

1st count: For breaking and entering the plaintiff's close being broken lot No. 24, between the 1st concession of the township of Pickering and on Lake Ontario.

2nd count: That defendant seized and took divers goods, &c., being on said close, and carried away and converted the same to his own use.

Pleas:—1st. Not guilty. 2nd. That at the several times when, &c., there was, &c., a public highway into, through, over and along the said close, wherefore defendant justifies at the said time, when, &c., passing over and along the said close by and along the said highway, doing no unnecessary damage, *quæ sunt eadem, &c.*

3rd. That there was a certain common and public landing place from Lake Ontario, and a certain common and public fishing ground through, over and along the said close in which, for all, &c.

4th. To 1st count: not the plaintiff's close.

5th. To 2nd count: not the plaintiff's goods.

Replication.—1st. Similiter to 1st plea.

2ndly. To 2nd—traversing the alleged right of way.

3rdly. To 3rd—*De injuria*, to the country, &c.

4thly. To 4th—Similiter.

5thly. To 5th—Similiter.

The cause was tried before Mr. Justice McLean, at the Spring Assizes 1851, held in and for the County of York, when it was admitted that the lot in question was included in a crown grant to Lieutenant G. Hill, dated the 14th May, 1796, of lands in the township of Pickering, described as follows:—Commencing within one chain of the south-east angle of lot No. 25 *on the bank of Lake Ontario*, thence north 16 degrees west to the front of the second concession, thence north 74 degrees east 61 chains, thence south 16 degrees east *to Lake Ontario* 238 chains more or less, thence westerly *along the bank of the lake* to the place of beginning; being lots Nos. 22, 23 and 24, in the 1st concession, together with the broken lots 22, 23 and 24, between the 1st concession

and the lake, containing about 1,200 acres of land, exclusive of the usual allowances for highways. Also, an indenture made the 28th of May, 1839, between James Givens, Theresa his wife, and Saltern Givens, of the one part, and Margaret Parker, wife of Reuben Parker, of the other, whereby the said parties of the first part, in consideration of £346 granted, bargained, &c., unto the said Margaret Parker, her heirs and assigns in fee, all and singular those parcels or tracts of land in the said township of Pickering, containing by *admeasurement* 268 *acres of land uncovered with water*, being composed of lot 24 in the 1st concession, and the broken lot No. 24 between the 1st concession and the lake in the said township, butted and bounded as follows: commencing within one chain of the S. E. angle of lot No. 25 *on the bank of Lake Ontario*, thence north 16 degrees west, to the front of the 2nd concession, then N. 74 degrees 20 chains, thence S. 16 degrees E. *to Lake Ontario* 190 chains more or less, thence westerly *along the bank of the lake* to the place of beginning.

The township of Pickering lies on the north side of Lake Ontario, which washes its southerly front. The concessions are numbered from the front or south to the rear or north, that next the lake being called the broken front, and the lots are numbered from east to west. The alleged trespass was committed on a strip of land above the water level, which crosses the fronts of the broken front lots Nos. 23, 24 and 25, and separates the waters of Lake Ontario from a sheet of water within, now called Frenchman's Bay, which bay and strip of land the plaintiffs contended, form parts of the aforesaid lots. The principal question at the trial was, whether that portion of the strip of land in front of No. 24, was included in the grant of the said lot to Lieutenant Hill, and in the deed from the Givenses to Mrs. Parker.

One of the witnesses, a deputy provincial surveyor (Shier), stated that the broken front of Pickering had not been surveyed in the original survey of that township, but that the lines had been run by a deputy surveyor of the name of Galbraith, under the direction of the government, at what time not being stated. This witness proved a copy of the original plan of Pickering in the Surveyor General's office, in which the lines are extended through Frenchman's Bay to the shore of Lake Ontario. Shier also made a survey for the plaintiff in June last, and he stated that the east line of No. 23 had been run by Galbraith, and that from that line he measured on the beach westerly the width of No. 23, and found his line to correspond with the east line of 24 as run by Galbraith, north of Frenchman's Bay; that he then measured across No. 24, on the beach and placed a post on the limit between No. 24

and the road allowance between Nos. 24 and 25, but no such allowance is indicated on the plan; that he chained between 23 and 24, and found the measurement to correspond precisely with the original survey; that the strip of land in front of the bay in No. 24 is four chains across from the water of the bay to the lake, of which two chains and 25 links are beach and 1 chain and 75 links marsh, but that it is not uniformly so, varying according to the depth of water; that there was no outlet from the bay to the lake when he surveyed, although an outlet is indicated on the Government plan at lot No. 22; and it was in evidence that some times there was an outlet and at others not; that the bay is half a mile wide from south to north, or in front of No. 24, and that the beach in front of No. 24, is inaccessible except by water, or by going round by other lots on the east or west; there was also evidence that there is a bank at S. E. angle of No. 25, which is 20 or 30 feet from the water and about 24 feet high, against which the waves beat in stormy weather; that there is also a bank on the eastern extremity of the sandbar or beach, about 12 feet high, apparently on lot No. 21, and which is fenced by the occupant to the edge of such bank; that this bay was known to be open as far back as the year 1812, and for twelve or thirteen years afterwards, and accessible for batteaux and boats; that at that period the waters of the lake washed into the bay through an entrance near the centre half a mile wide—in short, over and across the spot where the defendant was proved to have erected a shanty or fishing hut. Other evidence was given, although not so strong, to the effect that the entrance was not practically open, but that a channel was formed and sometimes closed; that the level of the lake had been known to vary four feet in some seasons as compared with others, and that in stormy weather the waters washed up as high as the defendant's shanty, and a little beyond it, the land behind it being rather higher, the highest level of the beach being about forty feet above the water's level, which level some called the bank, and up to which the water washed in high water or stormy seasons, others said that in the spring and autumn the waters in the bay rise and force a passage through to the lake at differing and varying points, but sometimes deep enough to admit the passage of a sailing vessel from the lake; that the beach had undergone little change for the last twenty years, and that there are small trees and coarse grass growing on it; also that the owners of the lots adjoining on the east and west claim the beach in front as portions of their lots, and had apparently done so from the beginning, but there was no specific proof of uninterrupted and undisturbed enjoyment or possession as of right in any particular manner, nor was there except as above

evidence particularly describing the nature of the coast, or the height of the banks in front of Pickering to the east and west of 24, nor of the descriptions of other government grants of the broken front. The plaintiffs relied principally upon the descriptions contained in the government patent to Lieutenant Hill, and the government plans, together with evidence of actual possession. In support of the imperfect paper title of the plaintiff's, evidence was given with a view to show actual possession of the *locus in quo* as part of lot No. 24 to the following effect: that as far back as 1831, a brother of the plaintiff's was on the lot improving it for him; that some men had cut 500 cords of wood on it for him 19 or 20 years previous to the year 1851; that the wood was drawn out and placed on the beach in front of the lot (*i.e.*, on the *locus in quo*), whence it was carried away in vessels; that for some years back he had allowed a person named Goodwin to use this beach in carrying on the operations of fishing, for which compensation was made in fish, and that he (Goodwin) had erected a small shanty on it, &c.

That plaintiffs had put up a notice on the *locus in quo*, forbidding trespassing; that plaintiff had been seen frequently on the lot; that he lived on No. 24 in 1st concession and cut wood on the broken front and carried it across the beach, &c., but the beach was never enclosed by fencing or the like.

3rd. To shew a trespass by the defendant, it was proved that in the autumn of 1849 and 1850, the defendant had used the beach in front of No. 24 as a fishing ground; that he erected a shanty or building upon it and dug holes in the ground and planted posts for that purpose; that the posts were about 20 or 24 yards from the lake; that the shanty was used partly as a lodging and partly as a cooper's shop, and that the defendant had 14 men in his employment, and that great numbers came there to buy fish; that defendant claimed a right to be upon the premises up to the utmost extent to which the lake had risen, and that he had as good a right there as the plaintiff, although plaintiff had prohibited the defendant's erecting the shanty or occupying the beach.

In short, there was no doubt of the defendant's having trespassed on the *locus in quo*, if it was the plaintiffs' close.

At the close of the plaintiffs' case the defendant's counsel moved a non-suit, on the grounds—

1st. That the plaintiffs had not shewn such a possession as entitled them to maintain trespass, either by virtue of title or actual occupation, the deed from the Givenses not establishing any title under Hill, and none being proved, otherwise. The application was however refused. The defendant then relied on the three-fold defence—

1st. That the beach was not part of lot No. 24.

2nd. A public right of way across the same.

3rd A right to use the same as a landing place in the exercise of a public right of fishing in front thereof, as against which right the Crown could not grant it, although it might compose part of lot No. 24.

2nd. In support of a plea of a public right of way, the defendant gave evidence to shew that when the entrance into the bay had been closed up and a continued line of beach formed, people from the interior had been in the habit of passing along it with horses and waggons, &c., drawing wood, fish and other loads, &c., but some witnesses denied that there was any thoroughfare or common travelled road.

3rd. As to the right of fishery, there was general evidence that fish could be caught at certain seasons in front of the beach in question, and that persons were in the habit of fishing there and of passing and re-passing and landing, &c., on the beach in following such pursuit.

The case was left to the jury under a charge favorable to the plaintiffs, and they found for them on the first count with one shilling damages, and for the defendant on the second count.

In Hilary Term, 14 Vic., (February 1851), *James Boulton*, for defendant, obtained a rule calling on the plaintiffs to shew cause why such verdict should not be set aside and a new trial had, as being contrary to law and evidence, and for misdirection, and for the reception of improper evidence, without costs.

Hector shewed cause in the same term.

For the defendant, it was contended that the description contained in the patent and in the deed from Givens to Parker, did not embrace the *locus in quo*, and if they did that, it is a highway or public right and not grantable.

For the plaintiff, it was submitted that on the evidence the right of way or of fishery, as pleaded in the second and third pleas, did not arise; that the second plea was unsupported by proof, and the third, not in the matter of it any defence, so that if found for defendant the plaintiff would have been entitled to judgment *non obstante veredicto*.

That the description did include the beach, and that to Lake Ontario means to the waters thereof—citing *Moffatt* v. *Roddy*, 2 U. C. Q. B. R.

That the Crown could and did grant to the water's edge. *Blundell* v. *Catterall*, 5 B. & Al. 268; *In re the Hull and Selby Railway Co.*, 5 M. & W. 327; S. C., 8 C. B. 353; *Calmady* v. *Rowe et al.*, 6 C. B. 861.

That the plaintiff gave sufficient evidence of possession as against defendant.—*Duke of Beaufort* v. *Mayor of Swansea*, 3 Ex. R. 433;

Jones v. *Williams*, 2 M. & W. 325, and *Calmady* v. *Rowe et al.*, 6 C. B. 861.

That there was no evidence of a right of way or to inland fishing, &c., and if so, no right to dig holes on part of lot No. 24.—*Moffatt* v. *Roddy*, supra; 13 Jurist, 713; *Bagott* v. *Orr*, 3 B. & P. 472; *Gray* v. *Bond*, 5 Moore, 527; S. C., R. B. & B. 667; *Attorney General* v. *Parmenter*, 10 Price, 398.

That no objection was made to the learned judge's charge: that the only misdirection complained of is as to the proof of possession in the absence of proof of right in the Givenses to convey, but that there was (as ruled) ample evidence as against a wrong-doer.

Boulton, in reply, contended that the deed under which plaintiffs claimed expressly excepted land covered with water, and virtually excluded the beach in question, and relied on the evidence of his witnesses in support of the conclusion that it was not granted to Hill, or possessed by plaintiffs, the evidence of possession being insufficient in the absence of proof or title.

That the bay was open into and formed part of Lake Ontario, and was capable of being made a commodious public port or harbor; that the place of starting in the description being on the *bank* on the west, the line could not be carried across the bay and down to the water's edge on the east side of No. 24.

That in the government plan the bay is designated as a mere marsh, and being in fact a bay or harbor, the Crown was deceived and the grant void; or that if formed gradually since the grant, it deprived the owner of No. 24 of the land covered with the waters of the bay, which thus by accretion (as it were) became public right.

That the owner of No. 24 cannot claim the beach by accretion, not being formed from the main shore, but rising in fact out of the lake and forming a bay within in front of No. 24 and the other lots.

That it was used as a highway 35 years ago according to some of the witnesses, as adjoining a fishery on the lake shore, the public had an easement therein and a right to use it for the purposes of fishing as defendant did. He cited *Taylor* v. *Parry*, 1 M. & G. 604.

As to possession, he submitted—

1s. That there was no proof of possession or of title.

2nd. That the plaintiffs' deed did not embrace the *locus in quo*.

3rd. That plaintiffs were not entitled by accretion.

4th. That there was a public easement as a highway in common with Lake Ontario, which was a great highway.

5th. Or as adjoining the fishery.

MACAULAY, C. J.—1st. With respect to the evidence of possession, I think it sufficient if the beach formed part of lot No. 24, but not otherwise.—*Doe dem. Barrett* v. *Kemp*, 2 Bing. N. S. 102; *Jones* v. *Williams*, 2 M. & W. 326; *Woolway* v. *Rowe*, 1 A. & E. 114; Roscoe's Ev. 35, and ib. 501; *Elliott* v. *Kemp*, 7 M. & W. 312; 2 B. & B. 403; 5 Moore, 185; *Taylor* v. *Parry*, 1 M. & G. 604.

2nd. Whether the beach forms part of broken front of lot No. 24, it depends upon two considerations—

1st. Whether it is actually embraced in the description of the grant to Hill, and if so—

2ndly. Whether it was a public property which the King could not grant, or was deceived in granting.

The present case does not involve any claim to navigate or use the waters within the beach or bar, or to land upon or use the shore or bank bounding the bay or pond on the north; and restricted to the beach, it is necessary to distinguish between the *lake shore*, properly so called, and the land (whether a bank or slope) adjoining, but lying beyond or above the shore.—1 Mar. 313; *Miles* v. *Rose et al.*, 2 B. & B. 403.

It appears to me the *locus in quo* does form part of lot No. 25.

The description in the grant to Lieutenant Hill, commences at the south-west angle of this lot *on the bank of Lake Ontario*, and then gives the course of the westerly side line. In the easterly side line of No. 22, it runs *to the lake*, and thence westerly along *bank* of the lake to the place of beginning. It is evident therefore, that "*the bank of the lake*," and "*to the lake*" are treated as of similar import, and that from the *lake* a line may be run westerly along the *bank*.

Referring then to the case of *Moffatt* v. *Roddy*, in U. C. Q. B. R. and to these hereafter cited, it will be found that the *ripa* or bank, as intended in this patent, must be taken to mean the land line defined by the high-water mark.

If we refer to dictionaries, we find bank explained to mean the earth arising on each side of the water, that we say properly the shore of the sea and the banks of a river.—*Johnson's Dictionary*.

In the case of *Blundell* v. *Catteral*, 5 B. & Al. 268, (which determines that the public had no right of bathing in the sea, and as incident thereto of crossing the *sea shore* on foot or with bathing machines for that purpose), we find the legal import of the word *shore*. At page 275, Best, J., (who differed from the other judges,) speaks of the shore or beach as synonymous. Johnson in his dictionary defines beach as the shore, particularly that part that is dashed by the waves, and defines the strand as the verge of the sea or of any water.

At page 231, the shore is defined as the land between the high and low water mark at ordinary tides, or between the ordinary flux and reflux of the sea.—See also pages 202, 298, 304; Hale *De Jure Maris*, chapter 4, at page 301, Holroyd, J., speaks of the sea shore when covered with water. At page 303 he speaks of the *ripa* or bank which at page 308 Bayley, J. says applies to rivers or ports and probably also to the land above the high-water mark.

At page 286, it is said Lord Hale makes the distinction between the shore of the sea and the banks of a river, and at page 312, Abbott, C. J., says it may be admitted that whatever is true of navigable rivers and their banks may be true of the sea and its shores.

And the case of *Ball* v. *Herbert*, 8 T. R. 261, decided that the public were not entitled at common law to tow on the banks of navigable rivers. The latin word *ripa* is rendered as the bank of a river, and Johnson's dictionary says shore properly means the coast of the sea, but that it is applied to the bank of a river, which is a licentious use of it. Kellan's Dictionary of the Norman or Old French language gives *ripas de l'eue* as by the water side, or banks of the river.

In *Webb* v. *Richards*, 10 Law Journal Q. B. 204, Coleridge, J. said the beach or shore included that which lay between ordinary high and low water marks, and that these must be taken to mean the intermediate tides between the extreme spring and extreme neap.—See 1 Q. B. 439, S. C., in which however the charge of Coleridge, J., who tried the cause, is stated as it is in the Law Journal. In the matter of the *Hull and Selby Railway Co.*, 5 M. & W. 327, the shore is termed the *foreshore*.

In *Calmady* v. *Rowe and another*, 6 C. B. 861, at page 885, it is said the ordinary neap tide is the boundary of the *littus maris*. *Smith* v. *Her Majesty's Officers of State for Scotland*, 13 Jur. 713; S. P. Wilcox's Law of Waters, 20, 21; Bull's Law of Scotland, page 169, sec. 643, that lands bounded by the sea or seashore are alike, and both extend to low water mark—that is, include the shore subject to the public easement for purposes of navigation and to fish.—5 Co., 107; Dav. R. 56; 5 Ba. Ab. 498.

See the provincial statute 12 Vic., ch. 81, schedule C., the descriptions given of the cities of Hamilton, Kingston and Toronto, in which the terms "margin of the marsh," "margin of the water, water's edge of Lake Ontario," "low-water mark," "shore," margin of the water on the shore of Lake "Ontario," "shore of Lake Ontario," "easterly shore or water's edge of the river Don," "to the river Don" &c., are used

The meaning of the term "bank" was also much discussed in the

cases arising out of the disputes respecting the reservation of one chain on the top of the bank at the Niagara Falls—*Clark et al.* v. *Bonnycastle, &c.*; but there the question was attended with peculiar circumstances, and it turned on the fact of the original survey.

That the sea shore, subject to the public easements above mentioned —that is for purposes of navigation and to fish—may be granted by the Crown, seems clear on the following authorities.—*Scratton* v. *Brown*, 4 B. & C. 485, 6 D. & R. 536, S. C.; *The Attorney General* v. *Parmenter*, 10 Price, 378, 411; *Parmenter* v. *Attorney General*, 10 Price, 412, 464; *Lopez* v. *Andrew*, 5 Man. & Ry. 329; Chitty on Pleading 173, 207–8; Angell on Water Courses, Appendix 90; *Hooker* v. *Cummings*, 2 Jo. 90, Appendix 151; *The People* v. *Platt*, 17 Ju. 195; *Calmady* v. *Rowe and another*, 6 C. B. 886, 894 and note; *Duke of Beaufort* v. *Mayor of Swansea*, 3 Ex. R. 433, mentioned in 6 C. B. 895 note; *Rex* v. *Russell*, 6 B. & C. 566; 9 D. & R. 566; 1 All. & Nap. 348, Irish.

The elaborate discussions contained in the foregoing cases shew, I think clearly, that "to the lake" or "the bank of the lake," means to high water mark, and consequently the southern boundary of the grant to Lieutenant Hill, was the high-water mark or bank of the lake. In many situations, I doubt not, a defined line caused by the wash of the waves in ordinary weather is made, indicating a high-water mark as compared with the lower level in calm weather or low water, although the terms high and low water marks are usually adopted in relation to tide waters; and I consider that by the bank, as used in this description, must be taken to have been intended the *ripa* or land above the high water line—*Calmady* v. *Rowe and another*, 6 C. B. 888. Bayley, J., in *Dickens* v. *Shaw* cited ib. and *Blundell* v. *Catteral*, 5 B. & A. 268, whence it follows that the bar or sand bank in question along and above the high-water line must be regarded as the southern boundary of lot No. 24.

It was contended, that even if so intended, still the bay within formed part of the lake, and that the sand beach which formed it could not be granted, or was granted improvidently. This sheet of water has acquired the name of Frenchman's Bay, but when the bar is entirely closed it is a mere pond or pool, and I do not think it can be properly considered a portion of Lake Ontario any more than the marsh of Coot's Paradise at Hamilton, can be called part of Burlington Bay or of the lake.—4 Inst. 140, citing 43 E. 3 Norff, recorded in M. 15 and 16 El.

The case was, that the Abbott of Ramsey was seized of the manor of Brancaster in Norfolk, bordering upon the sea, upon 60 acres of marsh

of which manor the sea did flow and re-flow, and yet it was adjudged parcel of the Abbot's manor, and by consequence within the body of the county unto the low-water mark—Dyer, 326, b. No. 2; and it was adjudged—Pasch. 17 El. in the Exchequer—Diggs being plaintiff—that the land between the flowing and re-flowing of the sea belonged to the the land of the manor adjoining. So on the same principle, the marsh, bay or pond, and the sand bank or bar in the present case, may be parcel of the township of Pickering.—1 Keb. 506, 532; 1 Sid. 148, and Al. 10; *Chad* v. *Tilsed*, 2 B. & B. 503, S. C.; 5 Moore, 185.

The proprietors of certain lands on the sea coast, having forty years before, with a view to reclaim the sea mud, ran an embankment across a small bay which was used to be left almost dry at low water, and having ever since asserted without opposition an exclusive right to the soil of the bay, though the bank was forced by tempest, it was held that such usage was evidence whence anterior usage might be presumed, which, coupled with the general terms of the grant, served to elucidate it and to establith the right asserted.

The bed of the bay or pond is not left dry at low water, as appeared in that case; but here there is a grant from the Crown expressly shewn, as was there presumed, and the principle of that case seems to me applicable to the present. *Calmady* v. *Rowe and another*, 6 C. B. 885; Constable's case, 5 Co., 107; No. 2 Whit. 134, 166, 167, 280; *Miles* v. *Rose*, 1 Mar. 313; S. C. 5 Taunt, 705, is also material. There much stress was laid upon the flux and re-flux of the tide; and the cutting of reeds and navigating the creek or water with pleasure boats, was held evidence for the jury that it was a public navigable creek, &c., and they found that it was. The court refused to disturb this verdict, but had it been the other way it would have been equally suffered to repose.

The question of right by *accretion*, does not seem to me to arise. In relation to that point, I may mention—*Rex* v. *Lord Yarborough*, 3 B. & C. 91; S. C. 5 Bing. 153; 2 Blis. N. S. 147; 1 Dow. N. S. 178; *In re the Hull and Selby Railway Co.*, 5 M. & W. 327; Sal. 561, No. 3.

Looking at the description and contents of the grant, and the government plans by which the description was probably guided, and the evidence, I find no good reason to suppose the government improvident. —Sal. 561 (3); *Regina* v. *Boucher*, 3 Q. B. 649. It was manifestly intended to include the bay or pond; and unless it were clearly shewn to form a portion of the lake, over which the public had an easement or right to navigate at least, if not to fish, and which right could not be destroyed by such a grant, I do not think the argument of the King's being misled or deceived as to the real nature of this water can prevail;

and even if it really constituted a portion of the lake, as an inlet or bay, and fed thereby, it does not follow that the soil could not be granted subject to any public easement that might exist in relation to the use of the waters covering the soil. But that is not the question. It is, whether the belt of sand which separates the lake from, and forms the bay or pool, is grantable above the high-water line; for if so, it is granted, and intentionally granted. As to a public right of way, I find no sufficient evidence thereof.

The only remaining question is, whether the defendant had a right to land upon and use the *locus* for the purpose of *fishing*.

It may be assumed that the public have a right of fishing in the lake in front of lot No. 24. That is not the question, and it is unnecessary therefore to decide it.

It does not follow that such right confers, as incident thereto, a right to land or use the bank (being private property) above high-water mark in the pursuit of fishing, much less to dig holes or erect buildings thereon. The law on this subject will be found in the following books and cases.—Wilcox on Waters, 21, 128–30; Schultes on aquatic rights; Lord Fitzwalter's case, 1 Mod. 105; *Ward* v. *Creswell*, Willis, 265–8; *Warren* v. *Matthews*, 6 Mod. 73 and note; ib. 163; 1 Sal. 357; *Carter* v. *Murcott and another*, 4 Bur. 2162–3; *Bagott* v. *Orr*, 2 B. & P. 472; *Weld* v. *Hornby*, 7 East. 195; *Gray* v. *Bond*, 2 B. & B. 667; 2 Saund 175 (a); *Ball* v. *Herbert*, 3 T. R. 261; 4 T. R. 437; 1 H. B. 182; *Mayor of Oxford* v. *Richardson*, 1 Anst, 231; *Moffatt* v. *Roddy*, U. C. Q. B. R.; Angell on Waters, 151, 253; Kent's Com. 333, 347.

I perceive no proof of enjoyment or use sufficient to confer a right as by prescription, nor do the facts appear to me to create a question rendering it necessary to go into the cases on the subject.

I am of opinion therefore on the evidence—1st. That the *locus in quo* is above the high-water mark—in other words, forms part of the bank of the lake within the meaning of the description contained in the government grant, and that it is embraced in such description.

That the plaintiffs gave sufficient evidence of possession thereof, as against the defendant; that no public right of way or user above high-water mark is shewn, either as a highway or land road, or to be used in the operations of fishing; and that whether there be a public right of fishing in front of the lot and an easement to use the shore or space below the high-water line, are immaterial, as the jury must be taken to have found that the *locus in quo* formed no part of the shore thus defined and limited.

It becomes unnecessary to consider whether at all events the defen-

dant could justify digging holes, &c., even if a public easement as a fishing ground did exist, when the soil of the *locus in quo* was a part of the plaintiffs' close or lot.

The issues on the second count being found for the defendant, it is unnecessary to consider whether husband and wife could properly join in such a cause of action as is therein stated.

SULLIVAN, J.—I am of opinion that the verdict for the plaintiff should be allowed to stand.

Under the first issue, on the plea of not guilty, the plaintiff was bound to prove a trespass within broken lot 24, between the 1st concession of Pickering and Lake Ontario; and under the fourth issue, on the plea that the close was not the close of the plaintiff, he was obliged to shew possession of the place when the trespass was committed. It was objected at the trial that the plaintiff did not prove title to the lot in question, and, so far as a paper title went, he certainly failed, for he proved a patent from the Crown, issued in the year 1796, granting this lot with other land to Lieutenant George Hill, and then a conveyance from James Givens and his wife and Saltern Givens to the plaintiff's wife, without shewing any connexion between the grantee in the patent and the grantors in the conveyance to Margaret Parker. The patent therefore, is only of value to shew the boundaries of the broken lot 24, and the conveyance to the plaintiff's wife, was evidence to establish the point that his possession was under a claim of title to the whole of the lot, and that a possession of a part was intended to be possession of the whole.

As regards title, I think there can be no question in this case. Acts of ownership are proved in the locality of the trespass, and possession in the rear portion of the lot, which is ample title as against a mere wrong-doer. The difficulty in the case arises in the application of the description by abuttals contained in the patent to the ground on actual survey, as the defendant contends that the place in which the alleged trespass was committed was no part of the broken lot No. 24.

The description of the land, according to the patent, commences within one chain of the south-east angle of lot 25 on the bank of Lake Ontario. The first line of boundary of the tract described runs northerly from the lake; the second or rear line easterly; the third or returning side line southerly, *to Lake Ontario;* the fourth line runs westerly along the bank of Lake Ontario to the place of beginning.

In front of the lot 24 is a pond or body of water called Frenchman's Bay, between which and the open lake is formed a sand bank or spit of land extending from high land on No. 25—the lot west of the plaintiffs'

lot—easterly to high land east of the plaintiffs' lot, and closing the mouth of what at some remote period was a bay or indentation of the land. This bank appears to be formed of the shingle sand and other wrecks of the cliffs washed by the waves of the lake, gradually deposited across the mouth of what was once the bay, and when perfect forming dry land a few feet above the level of the water from one point to another, continuing the line of coast in the direction it would have taken had there never been any indenture of the land. It is represented as being liable to be broken through by high waves of the lake in storms, and by the pressure of the waters of the bay when they are high, so as to form an opening into the lake, varying in position and in width according to the circumstances for the time causing the beach, and filling up again gradually by the deposit of shingle and sand; thus when the spit of land is completed there is a perfect lagoon or pond inside, and when there is a breach, the pond has an opening into the lake, said sometimes to admit of the passage of batteaus, or even larger vessels. There is no evidence to shew the condition of this locality in the year 1796, or any reason to suppose that the character of the lagoon or bay was different from what it is at present. So far as I can learn, the lot was not surveyed on the ground previously to the issue of the patent, but the lines were afterwards run by a surveyor named Galbraith, by order of the government. John Shier, a surveyor employed by the plaintiff, swears that he chained the line between 23 and 24, and found it to correspond with the original survey. I am at a loss to say whether he means that the length of the line did or did not correspond with the distance given in the patent—*i.e.*, 238 chains from front to rear of the tract contained in the patent, including the bay and the spit of land in front—or whether he ascertained that point. The plaintiffs' counsel contends that the description in the patent covers the spit of land mentioned in the evidence, and upon which the trespass complained was committed; and the words "bank of the lake" and "the lake," as applied to the facts of the present case, designate the same boundary; that the pond of water cannot be said to be the lake, or its northerly shore the bank of the lake; and therefore that the spit of land is included within the broken lot, as described in the patent, of which the plaintiff proved himself to be in possession. On the part of the defendant, it is argued, that the bay evidently at some period was part of the lake; that it becomes so now when the barrier happens to be broken through; that the spit of land must be looked upon as an accretion of land which probably may belong to the owners of the adjacent lots, from each of which the land is continued across the mouth of the bay, but not to the

broken front of lot 24. He further contends, that his view is confirmed by the description in the conveyance to plaintiff's wife, "containing so much land uncovered with water, which expression, he says, excludes the notion that the land covered with water, called Frenchman's Bay, was intended to pass by virtue of that deed.

As regards this latter point, the conveyance in question might be of consequence to shew the extent which the plaintiff professed to possess or claim; and if that deed, put in by him as the one under which he claimed title, manifestly excluded the land covered by the waters of the bay, it would be difficult to construe the plaintiff's possession of land to the north of the bay into possession of the spit of land south of the bay; but if the boundary lines in the deed include the bay, the expression "land uncovered with water," can only be taken as the quantity supposed by the parties to be uncovered with water, omitting to mention the quantity covered with water, probably supposed by the vendor and purchaser to be of little value, and forming no part of the beneficial purchase. It is, I believe, not uncommon in letters patent granting lots of land including lakes, to mention the quantity uncovered with water, so that the grantee, entitled to a certain number of acres of land, might not appear to have received more than his allowance, and so that the land covered with water and therefore unfit for agricultural purposes might not count against him, but this does not prevent the land covered with water from passing by the grant if included within the boundary lines; the expression seems to convey the idea by implication that besides the arable land, or dry land, there is included in the grant land covered by water; and placing this construction upon the conveyance now in question, I think the expression in the deed rather in favor of the plaintiff than against him.

Then, as to the main question: I see no reason to suppose that the condition of the premises is materially different from what it was at the time the patent issued, or that the piece of water called Frenchman's Bay was then more properly a bay than it is now. The patent for lot 25 is not put in evidence in this case to show where the south-east angle of that lot, which is said in the patent granting No. 24 to be the boundary of the latter lot, but if the description of lot 25 commenced upon the bank of the lake, at the south-west angle of the lot, or at the south-east angle of lot 26, and that the front or southerly boundary of 25 was upon the lake or bank of the lake, as I suppose it was, this would manifestly place the south-east angle of lot 25 (the point of commencement of the description of 24) outside the spit of land and south of the pond of water, for no otherwise could the third or returning line

of 25 end at a point from whence it could be carried along the shore of Lake Ontario to the place of beginning, unless it could be shewn that at the time of the patent the spit of land now in question had no existence.

If we take the point of commencement in the description of lot 24 to be external to the bay and spit of land, then there is no way of reconciling the remaining description with the locality than by supposing the closed state of the bay to be that which existed at the time of the patent, and the state of breach and passage of the water, though from the lake, as casual and temporary. There is no evidence as to the actual state of the premises in 1796. The probability is that the line of coast was supposed to be continuous and that no actual survey was made antecedent to the patent. Under these circumstances, I have no difficulty in coming to the conclusion that the patent was effectual in granting the land covered with water included within the side lines of 24 and the spit of land outside, which, in my opinion, is the bank of the lake; and the lake, to which the third line of the description runs, is the water outside of that bank, along which the fourth line runs to the place of beginning.

I have considered a question that might have been raised on behalf of the plaintiff. The law is well settled in England as to the property in the land covered by sea water. It belongs to the Crown. The same rule prevails regarding all creeks and arms of the sea, and all navigable rivers up to the point where the tide rises. A different rule is however held to be in force upon all English rivers above the tide waters. There may be rights of public highway upon navigable rivers above the rise of the tide, but the land covered by the water of the river above tide water, is held to belong to the riparian proprietors. Those having then boundaries on each side, having property in the bed of the river to the middle or thread of the stream. However inapplicable this rule may be to such rivers as the Saint Lawrence or Ottawa, and more especially to the great lakes, to such waters as Lake Simcoe, Lake Saint Clair, or even to the Rice Lakes, we have no common law to guide us but that of England; and it would seem to follow that the plaintiff, as riparian proprietor of lot 24, is entitled to all the land covered with water to the provincial boundary line of the middle of Lake Ontario, and the consequence would be, that any accretion of land from the waters of the lake, whether in the shape of islands or otherwise, would belong to the riparian proprietor. Indeed, all existing islands at the time of the concession from the Crown, would follow the same rule, and the bank or spit of land now in question would belong to the plaintiff

or proprietor of lot 24, whether it was cast up before or after the grant, without reference to the description in the patent. I am of opinion however, that if the question comes to be settled without Legislative interference in this country, that our great rivers and lakes will not be held to be of the description of waters such as in England are above the rise and fall of the tide; all the practice of the land granting departments in the country show a different impression to have prevailed in all our harbors, and even upon the interior lakes water lots have been granted outside of the land of the riparian proprietors, and islands such as Barnhart's Island in the Saint Lawrence, Wolfe's Island, the whole of the Thousand Islands, the Allumette and Calumet islands in the Ottawa, islands in the Detroit and Saint Clair Straits, and all others similarly situated, have been treated as belonging to the Crown, notwithstanding grants on the shore to riparian proprietors; so that either the rule of the common law of England has been by common and universal interpretation most reasonably held not to apply to the lakes and great rivers of Canada, or else the whole of the lands of riparian proprietors, being held under grants from the Crown, containing boundaries defined in writing—these boundaries, when running to the water's edge, the bank of the water, the lake or the river, must be taken to extend no further, and to leave the land covered with water ungranted and the property of the Crown. It appears to me, therefore, that we must hold the grant now in question to extend to the edge of the lake and no farther; and though accretions of land may belong to the riparian proprietor to whose land on shore they become adjunct, in like manner as if the estate were upon the sea shore, yet islands formerly existing, as well as new accretions of land not adjoining the shore, must be taken to belong to the Crown, as well as the land covered by the water.

The other defences set up in this case, appear to me, clearly untenable. I can see no pretence for a right of common and public highway along the borders of the lake, of a right of fishing, or rather of landing fish on what is, I think, improperly called the lake shore. The sea shore, properly so designated, is the space of land between the low and high water of ordinary tides, absolutely exclusive of land which is casually covered with water, by means of storm, or inundation from other causes. The only natural cause, according to the common law, for the creation of a shore is wanting on our waters; and if we were to imagine a shore consisting of a space of land between low and high water—that is to say between the low water of the lake in its tranquil state and its high water when agitated by the winds, we should, in giving that

shore the legal attributes of the sea shore, by making that space a shore which is not so on the tide waters of the sea, held to be produced by the same causes; for on the sea coast there is just such a space, much more extensive than on these inland waters, which is above the high water tide mark, and which is covered by water when the sea is agitated, and which yet, according to the English authorities, is no part of the sea shore. As the sea rises, no doubt there is a common and public highway over the water, but when it falls to the ordinary level of tide water, there is no highway on the land. Moreover, the actual sea shore may be granted by the Crown, and then there is no highway over it; and even when it is ungranted, unless by dedication: there is no highway against the will of the Crown. I think that in grants of land in our waters having a river or lake boundary, the grant extends to the water, and there is no place between the land conceded and the water on which to place the highway; and I see no pretence for claiming a right of public highway upon the granted land, unless it is specially reserved.

The case of *Blundell* v. *Catterall*, 5 B. & A. 268, is very interesting. The difference of opinion between Mr. Justice Best and the other judges, elicited a most elaborate judgment, in which most of the learning applicable to this case, as regards the rights claimed by the defendant, will be found. *Scratton* v. *Brown*, 4 B. & C. 485, 496; *Calmady* v. *Rowe*, 6 C. B. 877; *The Duke of Beaufort* v. *Mayor of Swansea*, 3 Ex. 413 are cases which define with great precision the legal rights of the Crown, the grantees of the Crown, and the public, in and to the sea shore; and I see nothing in these cases, or in the numerous authorities to which they refer, to found a pretence for the claim of public highway or right of landing fish upon a shore granted to a subject.

It is to be observed, moreover, that the trespass complained of in the present instance, is shown to have been committed above the point which by possibility could be deemed shore, and that it consists not merely of the use of a way or of the convenience in landing fish, but in the driving of stakes and making erections, which no right of way or fishery could justify.

The whole case, in my opinion, depends upon the construction to be given to the patent granting the lot 24, and upon the question whether the trespass complained of was committed within the boundaries of that lot. According to my reading of the description in the patent, the land on which the trespass was committed is included; and I am of

opinion that the verdict given in favor of the plaintiff should not be interfered with, and that the rule nisi for a new trial should be discharged.

McLEAN, J., concurred. (*a*)

DOE DEM. MOULE V. CAMPBELL.

59 Geo. III., ch. 14—Erroneous survey—Improvements, when entitled to.

Where the government for any purpose has ordered a re-survey of a concession, and the surveyor so employed has planted posts to mark his survey, and the defendant has settled on a lot as marked by this last survey, the defendant in ejectment will not be entitled to *his improvements* under the acts 59 Geo. III., ch. 14, and 2 Vic., ch. 17, if the jury find that the plaintiff is holding according to the posts planted at the front angles of his lot in the *original survey*. The defendant in such case cannot be said to have settled on the land in consequence of an unskilful survey.

(Q. B., T. T., 14 Vic.)

Ejectment for land claimed by the plaintiff as part of lot No. 23, in the 9th concession of Sidney, but which the defendant insisted was part of lot 22.

The question was, whether this was a case in which the defendant was entitled to compensation for improvements under the 59 Geo. III., ch. 14.

The township of Sidney was originally surveyed by Mr. Aikin about the year 1797; he returned a plan shewing the township regularly laid out in all its concessions, and with the 9th concession, like the others, divided into lots of equal width. The patent under which the lessor of the plaintiff claims must have been intended by the government to conform to this survey; for the lot was described according to the diagram, and no other survey of the township had been made by order of the government. The Surveyor General reported that there was nothing in that office to shew that Mr. Aikin had not completed the survey of the 9th concession.

But it seems that in 1831, some of the inhabitants of Sidney having represented to the government that they could not find the boundaries of the lots in the 9th concession, Mr. Rankin, a surveyor, was employed by the government to run out the 9th concession; and proceeding to do so under proper instructions from the department, he found posts, or received evidence of the exact positions of posts at certain points along the line right or left of the lot in question, but none at the angles

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(*a*) McLEAN, J., differed from MACAULAY, C. J., as to the question of high and low water mark, he agreeing with SULLIVAN, J., that a distinction of high or low water could only be drawn where tide exists, and not in the inland waters of this province.

of the lot 23. He divided the space between the nearest ascertained monuments, as the act directs, into lots of equal size, and set posts. The defendant coming afterwards to settle there as the proprietor of Lot 22, took possession according to these posts which Mr. Rankin had set, and continued in such possession, making large improvmeents.

The lessor of the plaintiff insisted upon it that Mr. Rankin's survey, whether right or wrong as regarded mere measurement, was an unauthorised deviation from the original survey—such a deviation as no public authority but the legislature could sanction: that it could not have the effect of over-ruling Aikin's survey, which he undertook to prove on trial could be satisfactorily shewn to have been actually made upon the ground, and according to which he claimed a right to hold.

ROBINSON, C. J., delivered the judgment of the court.

There is no doubt that the 59 George III., ch. 14, sec. 2, does entitle the plaintiff to claim and hold according to the posts planted at the front angles of his lot in the original survey, if he can establish the position of those posts. (*a*) He did establish their position to the satisfaction of the jury, though according to Mr. Rankin's survey there must have been some great error in the staking out of the lots by Mr. Aikin. They have consequently found for the plaintiff, as they could not help doing, if the division of the lots according to the original survey was made out to their satisfaction, and if the possession taken by the defendant as the proprietor of lot 22 is inconsistent with such division.

The propriety of their finding is not called in question; but the point submitted to us is, whether the defendant is or is not entitled, under the 12th clause of the 59 Geo. III., ch. 14, to be paid for his improvements before the plaintiff can have the benefit of the verdict. (*b*)

(*a*) This section provides that all boundary lines of townships, all concession lines, governing points, and all boundaries, posts or monuments, which have been placed or planted at the front angles of any lots or parcels of land in the first survey, intended to determine the width of such lots or parcels of land, provided such survey has been performed under the authority of the executive government, shall be and the same are hereby declared to be the true and unalterable boundaries of all and every of such townships, concessions and lots, respectively; and that every lot or parcel of land respectively, whether it shall upon admeasurement be found to contain the exact width, or more or less than what may be expressed in any letters patent, grant, or other instrument, in respect of such boundaries or lines mentioned and expressed, shall embrace the whole width contained between the front posts, monuments or boundaries, planted or placed at the front angles of any such lot or parcel of land as aforesaid, in such original survey, and no more nor less, and every half or quarter of such lot or parcel its proportion—anything in such patent or instrument to the contrary thereof in anywise notwithstanding. Similar provisions may be found in the Consolidated Statutes for Upper Canada, ch. 93, sec. 14-16, p. 917.

(*b*) This section provided that where ejectment should be brought, after such lines had been established by said act, for land cultivated by another party, in

It is clear that the act does not give that right under the circumstances of this case. The defendant cannot be said to have settled upon the plaintiff's land in consequence of unskilful surveyors; for all that appears, Mr. Rankin's survey was skilfully and correctly made according to the instructions he received. The government may have directed it to be made for their own satisfaction, in order to see whether there had or had not been an error in the first survey, or in order to discover whether the 9th concession line had been run out or not by Aikin, or under the idea that it probably was not, in which case Mr. Rankin's might have been treated by them as the first survey in that part of the township; or they might have directed the survey as preparatory to an application to the legislature for an act to correct the error. A survey made for any such purpose, and accurately made upon the instructions received, cannot be called an erroneous survey. The error would be in either the defendant or the government imagining that because it was more correct in measurement it could prevail over the original survey, even when it could be traced to the satisfaction of the jury.

The plaintiff has a clear right given him by the statute to hold according to the survey made on the ground in the first instance, and according to which his lot 23 occupied a certain position marked out on the ground, and the defendant had no ground for supposing that he was at liberty to settle according to posts set not only after the first survey but after the plaintiff had received his grant.

It may be a hard case on the defendant that he should have to give up the land and have no compensation for his improvements; for it is very probable that he imagined he was safe in taking Rankin's posts for his guide. The only answer we can give to that is, that if the legislature had chosen to enact that in all cases in which a party had been misled by any survey made under the authority of government, he should not be obliged to give up the land which he has occupied without being paid for his improvements, we should have had no hesitation in giving effect to their enactments, but the provision they have made is not that; and we think it clear that the language of 59 Geo. III., ch. 14, and 2 Vic. 11, ch. 17, shews that the legislature had not a case of this de-

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consequence of unskilful surveyors, it should be lawful for the Judge of Assize to direct the jury to assess the value of any improvements made before action brought, or the value of the land to be recovered—and that on a verdict for the plaintiff, no writ of possession should issue until payment or tender of payment of such value—or the defendant may pay the plaintiff the amount found as the value of the land. The same provisions are embodied in the Consolidated Act, ch. 93, sec. 58, pp. 926-927.

scription in their mind as one calling for compensation, and we cannot extend the terms of the act.

We are of opinion that the rule should be made absolute for setting aside the assessment of the value of the land and improvements, which will entitle the plaintiff to his writ of possession.

If the defendant, though he has not moved against this verdict on the principal ground, should still be of opinion that the question of boundary was improperly decided against him by the jury in consequence of their believing the evidence respecting the posts planted in the original survey, when they ought not to have believed it, he has it in his power to bring another ejectment if he shall be so advised, and if what has been done under the boundary commission act does not conclude him. But, considering the grounds on which the verdict has been given against him, we cannot decide that he is entitled to be paid for his improvements, unless we could properly hold that in every case where the government may for any purpose have ordered the re-survey of a concession, and the surveyor so employed has planted posts to mark his survey, any proprietor of land may safely adjust his possession according to those posts, in the confidence that he cannot be dispossessed without being paid for his improvements, even though the posts planted on the orignal survey may be still standing on the ground and should shew his possession to be wrongful.

Per Cur.—Rule absolute.

BABY V. BABY.

Liability of Deputy's Surety to Treasurer of Western District—its extent, as depending on the change in the Treasurer's mode of appointment to office.

A. became surety to B., the treasurer of the united counties of Essex, &c., for the due accounting, &c., by C., as deputy treasurer, while he, B., continued in his said office. C. received monies for which he did not account, and B. sued A. upon the bond. B. held his commission as treasurer *from the government* from the execution of the bond to the 10th October, 1846; and from that time to the 16th August, 1849, in consequence of a change made in the mode of appointment, he held his office under an election of the Municipal Council of the Western District: *Held, per Cur.*, upon these facts, that B. could sustain his action against the surety A.—1st, without proof in the first instance that he had actually paid the money himself which his deputy, C., had misspent; and secondly, that the surety was liable during the whole time the deputy was serving in the treasurer's office, without reference to the mode of the treasurer's appointment.

(Q. B., T. T., 14 Vic.)

The plaintiff sued, describing himself as treasurer of the united counties of Essex, Kent and Lambton, on a bond made by the defendant 26th March, 1842, in the penalty of £1000.

The condition was set out by the defendant on oyer, and it was recited in it that—"Whereas, William R. Wood, of &c., has been employed in the office of the said J. B. Baby as treasurer heretofore, and whereas the said Charles Baby agreed at that time and now for the said William R. Wood for the due performance of the duties thereof, and for the proper custody of the same, rendering a true account of monies belonging to the said office of treasurer, and the due payment of the same to all persons who may be entitled to the same, and the said treasurer. Now the condition of this obligation is such, that if the above bounden Charles Baby, his heirs, executors and administrators, shall well and truly indemnify and save harmless the said J. B. Baby, or his said office of treasurer, from all misfeazance, malfeazance and wrong doings of the said William R. Wood in the said office, and for all monies which he may be accountable for, whether the same are now done or to be done, but those which were committed by the said William R. Wood ever since he has been in the custody of the said office of treasurer aforesaid, and of the monies, matters and things thereunto belonging, so that he, the said treasurer, shall be kept free from all incumbrances, blame, damage and loss by any act or acts of the said William R. Wood in the said office now or hereafter, then this obligation to be void; otherwise, &c."

And the defendant pleaded that the said office of treasurer in the said writing obligatory mentioned, was the office of treasurer of the Western District; and that the plaintiff remained and continued as such treasurer from the time of the making of the said writing obligatory until and at the 10th October, 1846, and that during all that time, and until the said 10th October, 1846, and no longer, the said William R. Wood continued in the office of the plaintiff *as such treasurer as aforesaid;* and the defendant says that the plaintiff hath not at any time since the making of the said writing obligatory and condition thereof, hitherto been in anywise damnified by reason or means of any matter or thing in the said condition; and this, &c.

The plaintiff replied, that he was not only treasurer to the 10th of October, 1846, but was also from that day continually to the 16th of August, 1849, treasurer of the said Western District, and that during all that time, from the making of the said writing obligatory to the said 16th of August, 1849, the said William R. Wood continued acting in the office of the plaintiff as such deputy of the plaintiff, as in the said bond mentioned; and that while the said William R. Wood so remained and continued in the office of the plaintiff as such deputy aforesaid, on divers days, &c., between the making of the said writing obligatory and

the 16th day of August, 1849, the said William R. Wood, as such deputy treasurer, and so acting in the office of the plaintiff as such treasurer as aforesaid, had received and took from divers persons divers large sums of money, in the whole amounting to 3000*l.*, &c., and then converted the same to his own use, and did not pay or account for the same or any part thereof, and the same still remains due and unpaid to the plaintiff; and this, &c.

The defendant rejoined, that the plaintiff, at the making of the writing obligatory was the treasurer of the Western District, holding his office under a commission issued to him by his late Majesty William IV., and continued to hold the said office under such commission from thence till the 10th October, 1846, as in the said plea mentioned; and averred that Wood duly accounted for and paid over all monies, &c., received during that time; and that under a statute passed in the 9th Vic., entitled, &c., the said commission on the 10th of October, 1846, ceased and determined; and that plaintiff was then duly elected by the Municipal Council of the Western District treasurer of the Western District, and by virtue of the said statute and the said election continued treasurer from the said 10th of October, 1846, to the said 16th day of August, 1849, and under no other authority or commission whatever; and that the said William R. Wood continued as such deputy treasurer of the said district, under the plaintiff as such treasurer, under and by virtue of a new appointment of the said William R. Wood as such deputy treasurer, made by the plaintiff on the said 10th of October, 1846, and under and by virtue of no other authority or commission whatever; and this, &c.

The plaintiff surrejoined that the said William R. Wood did not well, truly and faithfully account for and pay over to the plaintiff, as treasurer aforesaid, all monies received by the said William R. Wood in the said office of treasurer, or as such deputy treasurer as aforesaid, from the day of the date of the said writing obligatory until the 10th of October, 1846; nor did the said William R. Wood continue as such deputy treasurer, under the plaintiff as such treasurer, from the 10th of October, 1846, to the 16th August, 1849, under and by virtue of a new appointment of the said William R. Wood, as such deputy treasurer, made by the plaintiff on the said 10th of October, 1846; and this, &c.

It was proved on the trial that Mr. Wood had conducted the business of the office of treasurer from the time the plaintiff was first appointed to the 16th of August, 1849, when Wood absconded, leaving a deficit in his accounts to the amount of more than 2000*l.* Wood was during that time serving on a salary of 50*l.*, paying to the plaintiff his legal per centage on monies, deducting his own salary.

Some receipts for taxes on lands had been brought in since he absconded, which were found not to have been credited—one dated January, 1845, for 97*l.*—another 12th November, 1847, for 91*l.* 7*s.* 2*d.*—another 11th January, 1845, for 5*l.* 0*s.* 4*d.*—another 1st December, 1845, for 4*l.* 8*s.* 0½*d.* There was collected for the Lunatic Asylum 257*l.* 19*s.* 11*d.* not accounted for, of which 208*l.* 1*s.* 9½*d.* was received before 1846, and the remainder afterwards. Also 88*l.* charged before 1846 as remitted to the Receiver General, but not acknowledged to have been received.

It was admitted that up to the 10th of October, 1846, the plaintiff acted as treasurer under his appointment by the Crown; and that on the 10th of October, 1846, he was elected treasurer under the municipal council, and continued to act as such to the 3rd of January, 1850, and that Wood acted as clerk in the office under and for the plaintiff from the time of the plaintiff's first appointment by the government up to the 17th August last.

It was contended that the defendant's liability under his bond ceased on the 10th of October, 1846, when the plaintiff's commission ceased; and was not revived upon the plaintiff's election to the office by the municipal council.

It was contended, also, that the books kept by Wood and in his writing were not legal evidence to charge the defendant—which objection was overruled. The learned judge recommended a verdict for the plaintiff for the penalty of the bond—1090*l.*, with leave to the defendant to move to reduce it to 735*l.* 13*s.* 3*d.*, if the defendant should be held liable only for defalcations up to 10th October, 1846.

The verdict was so rendered, and a rule nisi was obtained by *Cameron*, Q. C., for a new trial on the law and evidence, and for misdirection. He cited 18 L. Jl. 153 Exch.; 12 Ea. R. 400; 3 M. & R. 502; 9 B. & C. 35; 2 Bing. 35; 1 M. & W. 386, 390; 6 Q. B. R. 514; 7 C. & Fin. 572; Ch. on Contracts, 6th American edition, 522.

Vankoughnet shewed cause; he relied upon 3 Exch. R. 381.

Upon the argument of the rule nisi for a new trial, the misdirection insisted on was not directing the jury that the plaintiff was bound to shew an actual damage sustained by himself in consequence of the default of Wood, and could recover only for the damage so sustained, and that at all events upon the pleadings and evidence the plaintiff could only recover for monies received up to 10th October, 1846, while the plaintiff's tenure of office continued under his commission from the government.

ROBINSON, C. J., delivered the judgment of the court.

As to the first objection—the obligor is bound to save harmless the obligee from all defaults of Wood in his office, so that the obligee shall be kept free from all incumbrance, damage and loss by any act or acts of Wood. If Wood has by his misconduct left the obligee liable to any claim for monies misapplied, the obligee cannot be "saved harmless nor free from incumbrance or loss," but by paying the money which he is liable for, and it cannot be maintained that in such a case the obligee must be first put to the inconvenience of paying the money himself which his clerk has misspent.

The other point, we think, is scarcely more doubtful. There is but one plea on record, and the subsequent pleadings by way of reply rejoinder and surrejoinder, narrow the issue so as to leave only the questions—1st. Whether Wood did faithfully pay over and account for to the plaintiff as treasurer all monies received by him *in the said office of treasurer*, which words, it is evident from the recital and context, must mean, as applied here, *in the office of the said treasurer* from the date of the bond *to the 10th October*, 1846.

2nd. Whether Wood did or did not continue as such deputy treasurer, from the 10th October, 1846, to the 16th August, 1849, under and by virtue of a new appointment as such deputy treasurer, made on the said 10th October, 1846.

It is quite clear, we think, that the plaintiff was entitled by the evidence to succeed on both issues, and there was nothing more to try. Mr. Wood, it was shewn, had not duly accounted for all monies received up to the 10th of October, 1846, and the plaintiff was entitled, under the breach assigned, to recover for the amount which he had up to that time received and failed to account for. Then, as to all monies in regard to which Wood had been in default which were received after that time, the only answer on the record is, that Wood received such monies under a new and distinct appointment made after the plaintiff ceased to hold office under the commission which he had at the time of the execution of the bond. This the plaintiff denies, and nothing whatever appeared on the evidence to support it; not a word of any such new appointment is to be found in the testimony; and it seems not to be pretended that there was anything of the kind.

If the question of the defendant's liability can be properly raised upon the whole record, notwithstanding the issues being brought down to these points on which the plaintiff was unquestionably entitled to succeed, still we have no doubt that there is really nothing in the question. The evident intention of the bond was to secure the plaintiff from loss while Mr. Wood should be serving him in the office of trea-

surer; and the fact is clearly shewn to be, that he was serving the plaintiff in the office of treasurer all the time from the date of the bond (and before) to the 17th August, 1849. It was of no consequence to Wood or his surety by what tenure Mr. Baby held the office in which he was a mere clerk. The office always existed, and was all the time under Mr. Baby's charge, and it was in his behalf that Mr. Wood received all the money. If Mr. Baby at the same time that he took this security had given a bond to Mr. Wood to pay him a certain annual salary so long as he should serve him in the office of treasurer, he could not have set up a defence against paying that salary, that in 1846 he became treasurer by a new mode of appointment, and that although Wood had continued to serve him in the same office he was no longer bound by his bond.

The cases cited on the argument are some of them very strong to shew that it is the plain intention of the parties, as appearing in the instrument, which is to govern in regard to such securities; and those decisions which have turned upon changes in the office and duties of the person for whom the surety has undertaken, do not apply to the present case (12 Ea. R. 400; 3 M. & S. 512; 9 B. & C. 35).

Per Cur.—Rule discharged.

McKenzie v. Gibson.

Right of private person to arrest without a warrant, for supposed felony—When it can be justified—Replication to a plea of justification to trespass denying the truth of the matter of justification and new assigning.

When a private person—not being by office a keeper of the peace or a justice, or constable—takes upon himself to arrest another, without a warrant, for a supposed offence, he must be prepared to prove, and to affirm it clearly and unequivocally in his plea, that felony has been committed; strong suspicions of a felony having been committed will not do.

Where to a plea of justification to the trespasses charged, the plaintiff replied 1st, that the defendant of his own wrong and without &c., and 2nd, new assigned as for trespasses on another and different occasions, &c., it was *Held per Cur.*, that the replication was not bad as being double.

(Q. B., T. T., 14 Vic.)

Declaration—4th count. Trespass for assaulting plaintiff with violence and taking him to gaol without any reasonable cause.

The 2nd plea to 4th count, and the 3rd plea to 4th count, were pleas setting out at length a justification of the trespasses complained of, on the ground that a felony had been committed by the plaintiff; the pleas however contained no *direct and positive averment* that a felony had been committed, but merely related circumstances out of

which the court might collect a charge of felony. And as the defendant did not justify as a peace officer, but a private person, these pleas were demurred to.

Replication to 4th plea—that the defendant of his own wrong, &c.

And new assignment to 4th plea—that on another and different occasion &c., the defendant assaulted &c.

Upon the argument on the demurrer to the 2nd and 3rd pleas, the defendant excepted to the replication that it was double.

Wm. Eccles, for the demurrer. *Cameron Q. C., contra.*

Cases cited—6 B. & C. 635; 8 C. & P. 522; 4 Taunt. 34; 5 Bing. 364; 3 M. & Gr. 390; 8 C. & P. 94; 4 B. & C. 596; 3 C. P. 333; 5 Tyr. 481; 4 M. & Gr. 988; Jurist, 808.

ROBINSON, C. J. delivered the judgment of the court.

The first demurrer is to the defendant's second plea to the trespass newly assigned by the plaintiff, in answer to the defendant's second plea to the 1st count; and upon the argument the defendant took exception to the replication to which that plea is an answer, contending that it is double; but that objection, it is clear, is not tenable, for the plaintiff gives but one reason to the defendant's plea—that is, he does not give a double answer to any part of it. He admits that there is a part of the trespass for which he is suing to which the plea in question implies, and he does not deny but that the defence pleaded as to such part of the injury he is complaining of would be a good defence, if it were true, but he denies that it is true; then he states further that he is suing not only for the trespass which the defence pleaded would well justify, if it were true, but also for a further trespass not committed by the defendant under color of any such justification, but on a different occasion altogether.

This mode of answering a special plea in justification, is often met with, and must in the nature of things be admissible, otherwise the plaintiff would not be able, in such cases, to give a complete single answer to the justification pleaded.

Then, as to the second plea in answer to the new assignment, we are of opinion that it is insufficient, because it does not directly and positively aver that a felony was committed, but that the defendant found that the note which he speaks of had been forged and altered, which allegation that the defendant found the fact to be so, is argumentative and rather the statement of evidence of a fact than affirming the fact itself.

Issue could not be taken upon the defendant's allegation as to what he found: the question is, what the fact was, not what the defendant found.

So also as to the statement that the alteration was in the hand-writing of the plaintiff; that is again stating proof of a forgery. If the defendant meant to charge the plaintiff with having committed a felony, he should have stated that directly and distinctly, and not by relating circumstances out of which we may collect a charge of felony.

We take the law respecting the right of a private person to make an arrest in such cases, to be at this day, as it is clearly stated to be in Hale's Pleas of the Crown, 2nd vol. 76—namely, that when a private person—that is, a person not by office a keeper of the peace, or justice, or a constable—takes upon himself to arrest another without a warrant for a supposed offence, he must be prepared to prove, and therefore must in his plea affirm, that a felony has been committed, for in that respect he acts at his own peril.

That point in his defence must be clear; mere suspicion that there has been a felony committed by some one, will not do; though if he is prepared to shew that there really has been a felony committed by some one, then he may justify arresting a particular person, upon reasonable grounds of suspicion that he was the offender; and mistake on that point, when he acts sincerely upon strong grounds of suspicion, will not be fatal to his defence.

There is some semblance of authority in one or two cases for supporting the position that a private person will be justified in arresting upon strong suspicion merely that a felony has been committed, but the current of authority up to the present day is quite the other way; and we must hold that it is a fatal defect in this plea, that it does not unequivocally and clearly allege that a felony had been committed.

I find no precedent of a plea which does not lay that foundation for the defence, in direct and positive terms, though the plea need not contain all the technical language of an indictment in charging the offence.

I refer to *Hall* v. *Booth*, 3 Nev. & Mang. 316; and *Atkinson* v. *Warne*, 3 Dowl. 483; as for the manner in which such pleas of justification are framed.

The third plea to the fourth count, which also is demurred to, is in our opinion insufficient for the same reason. It does not charge in proper terms that a felony had been committed by any person; but only that the defendant found that the note which he had endorsed had been forged, and altered without his consent.

We do not think it necessary to go into the other exceptions raised to the pleadings, several of which are clearly not tenable.

Per Cur.—Judgment for the plaintiff on demurrer, with leave to amend on payment of costs. (*a*)

LANE V. THE OFFICERS OF THE ORDNANCE.

Officers of Her Majesty's Ordnance—their liability to be sued in our courts in their collective capacity.

The Officers of Her Majesty's Ordnance, composing a department of the public service existing in England, cannot at the common law be sued in our courts in this province, in their collective capacity, for an alleged culpable negligence —the remedy against them for any wrong done by the orders or omissions of the board, *as a board*, can only be by application to the crown.

(Q. B., T. T., 14 Vic.)

The plaintiff, as administratrix of James Lane, deceased, sued under the provisions of the statute 10 & 11 Vic., ch. 6, charging in the declaration that the defendants were seized in fee simple of the Rideau Canal, and of the land covered by the water thereof, and of the several locks, gates and bridges used in connection with or for the purpose of crossing over the canal; and that the cutting the canal intercepted the means of communication and travel at the Kingston Mills—to restore which, the defendants built a bridge for the use of Her Majesty's subjects and others having occasion to cross, and such bridge was erected on the defendants' land, and was their property and under their charge and control; and that all Her Majesty's subjects and others had right to use the said bridge; and thereupon it became the duty of defendants to keep the bridge in good repair; but that defendants, not regarding, &c., permitted the bridge to be out of repair and unsafe; and that James Lane did go on the said bridge to cross the same, and that owing to the unsafe condition of the bridge and sides, side-pieces and hand-rails thereof, the said James Lane fell over and received divers injuries, whereof he died within twelve calendar months next before the bringing of this suit, *ad damnum*, &c., and for plaintiff's benefit as widow of James Lane, and that of three of his infant children.

1st. The defendant pleaded not guilty;

2nd. A denial of the duty charged to keep the bridge in repair; and

3rd. That the bridge was in as good repair as was necessary to enable persons to cross it in safety.

At the trial, at the last assizes at Kingston, before Draper, J., it appeared that the bridge was erected to restore the communication which

(*a*) See in connection with this judgment the case of *McKellar* v. *Macfarland*, *ante* page 321.

had been interrupted by the canal being cut through the main high road at the Kingston Mills; that it was originally and finally completed by the officers in charge of the Rideau Canal, in a solid and substantial manner, so as to allow ordnance to pass over it safely, and that it had been in fact kept under the charge of such officers from the time of its completion; that James Lane, with two other persons—one of whom was stated to be intoxicated, and to be supported arm in arm by Lane and the other—went on the bridge to cross late one night in November last, and that in some way, owing to the state in which this third person was, the three swung round against the side railing of the bridge, which immediately gave way, and Lane fell over into the lock and was killed. The side-rail appeared to be rotten, though the bridge itself was quite safe, and any person could have crossed without danger, unless they had struck against the side-rail. It was suggested that Lane had been drinking also, but several witnesses swore he was sober; Bresson, who was supporting Short (the tipsy man) on one side, swore Lane was sober, and described the accident as arising from Lane being swung round—he (Bresson) being as it were a pivot—and thus Lane was thrown with his whole weight against the rail; Short fell partly over, but Bresson saved him.

It was objected that the Rideau Canal Act, 8 Geo. IV., ch. 1, did not impose on the defendants the duty of keeping up and maintaining this bridge;

2nd. That the statute 10 & 11 Vic., ch. 6, did not extend to a case like this; and

3rd. That the defendants, under the 7th Vic., ch. 11, were not the owners of the bridge, so as to be chargeable.

The objections were overruled at the trial—leave being reserved to the defendants to renew them on motion for a non-suit.

The jury were directed that if the bridge was only necessary to be established a highway intersected by the canal, and was substantially built and finished, the defendants were not, under 8 Geo. IV., ch. 1, liable to maintain it—though if a bridge erected for canal purposes only, it would be different; but that for the purposes of this trial, the jury should assume the defendants were liable to repair having always kept the bridge under their control, or that of the officers in charge of the canal. Then they should enquire whether the plaintiff, by his own negligence and want of ordinary care, contributed to the injury which caused his death—and if so, to find for defendants; but if not, to find for plaintiff, with such damages as they thought reasonable—leaving the question of the defendants' general liability to be discussed on the motion for non-suit.

The jury gave a verdict of 200*l.*, to be divided equally between the widow and the three children.

Kirpatrick obtained a rule *nisi* to enter a warrant on the leave reserved, or for a new trial—the verdict being contrary to law and evidence and the judge's charge.

P. Vankoughnet and *Burrowes* supported the rule, and cited the following authorities:—10 & 11 Vic., ch 6; 7 Vic., ch. 11, secs. 30, 33; 7 Ju. 224; 3 Bl. Com. 255; 3 M. & W. 244; 1 Q. B R. 39; 10 M. & W. 546; 3 C. B. 1, Jurist, 20th April, 1850.

A. Campbell shewed cause, and referred to 15 L. Jl. 245, C P.; 3 Bing. N. C. 468; 1 Q. B. R. 89; 5 C. & P. 190; 1 M. & W. 435; 1 Phillips' Rep. 307; 5 U. C. R. 6.

ROBINSON, C. J., delivered the judgment of the court.

There could in our opinion be no reasonable hope of success in this action. The poor man Lane came to his death apparently by the want of ordinary care and prudence, which his intemperate habits and his condition, or at least that of his companions, at the moment when the fatal accident occurred, disabled them from exercising; and it is to be regretted that his widow should have been encouraged, under such circumstances, to seek in a court of law for an indemnity against the consequences of the misfortune, which, under any circumstances, it is quite clear they could not have obtained through such a proceeding.

If our provincial statutes on which this action was brought, 10 & 11 Vic., ch. 6, had never been passed, or if a year before it was passed three men going in a helpless state of intoxication at night over this bridge had so far deviated from the usual manner of walking over a bridge that, having hold of each other's arm, the one farthest from the rail on one side of the bridge, in his gyrations, brought himself and his two companions with the weight of their three bodies at once upon the hand-rail, which was never meant to bear that kind of stress, and if in consequence of its giving way one of them had been injured, but not killed, and if when he became sober he had gone to seek advice, I think it would not have entered into any one's mind to tell him that he had a good action against the officers of Her Majesty's Ordnance for negligence; and unless such an action—which I am satisfied no one could have thought of bringing—would have lain, most clearly there can be no pretence for this action upon the statute 10 & 11 Vic., under the circumstances of one of the men, Lane, having died; for all that the statute provides is, that "whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default *is such as would* (if death had not ensued) *have entitled the party*

injured to maintain an action and recover damages in respect thereof, then, and in every such case, *the person who would have been liable if death had not ensued*, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

The Rideau Canal was made by an officer employed by the ordinance, acting for the crown, in their department of the public services. Having intersected a public highway by the line of this canal, he was bound by the statute which gave the necessary powers for laying out and constructing the Rideau Canal, to restore the communication which he had interrupted, by building a bridge over the canal at that point; and it may be assumed, that while the canal is in the possession and under the exclusive control of officers of the ordnance, there is the same obligation to keep it in repair that there was to build it; that entitles us to say nothing more than that is incumbent on the crown to do this—and for the neglect of that duty, and for an injury properly and plainly attributable to that neglect, and not arising from any fault of the party injured, what would have been the civil remedy at common law—what would now be the remedy, which is the same question, for the statute applies only where a person is killed by the accident, and leaves any claim on his part for damages when he survives, exactly where it stood at common law.

The Ordnance Vesting Act, 7 Vic., ch. 11, was referred to on the argument, the 30th & 33rd clauses being those material to be considered, if indeed, anything in that act can possibly affect the question one way or the other.

In the case of *Tully* v. *The Principal Officers of Her Majesty's Ordnance* (5 U. C. Rep. 6), we had occasion to consider the objects and effect of that statute, and much that we then felt it necessary to remark applies even more strongly to this action. The officers of ordnance compose a military department of the public service; they are in England, not within our jurisdiction, and by the common law no more within reach of our process than the Admiralty or the Bank of England. For certain purposes, in order to enable the crown through them to carry out contracts and protect public property under their charge, powers are given by the colonial act referred to, and the right of suing and the liability to be sued is to be seen so far as may be necessary for the objects of that act, in terms conferred by it; and some provisions are contained in it which I confess myself unable fully to comprehend and to apply in a manner consistent with some clearly acknowledged principle, and that shall not lead to consequences which never could

have been intended or contemplated. But I see nothing in the statute that can tend in the remotest degree to give an action in our courts against a department of the public service existing in England, for an alleged culpable negligence. The remedy can only be by application to the crown, for any wrong done by the orders or omissions of the board as a board.

Each officer of the ordnance acting in Canada, like all other individuals in the civil or military service, may, according to the circumstances, involve himself by his illegal conduct in personal liability, as a trespasser or otherwise, and he may be made to answer in damages for his unauthorized acts, subject however to certain principles and distinctions established by judicial decisions, and indispensable to the efficiency of the public service and the just protection of those who are engaged in it; but on what we are to found here in Canada, a right of legal recourse through our courts of justice against a department of of the public service existing in England in a collective capacity, I am wholly at a loss to imagine; and what use it could be proposed to make of a judgment against Her Majesty's Ordnance, rendered in our courts in such a case, not within the statute 7 Vic., ch. 11, is equally difficult to understand. It could have no other effect than to leave the plaintiff to pay his own costs, unless the sheriff could sell a fort or a magazine, or a canal, to satisfy the judgment. (*a*)

We make absolute the rule nisi for non-suit, without going into any consideration of the cases cited to shew that though the party going over the bridge was intoxicated and acted imprudently, and was in a measure the cause of the accident, the action might nevertheless be sustained, because we do not set aside the verdict on any ground which requires that point to be considered, but because this action could not have been sustained under any state of facts.

Per Cur.—Rule absolute for non-suit. (*b*)

(*a*) So in regard to Foreign Potentates—in the case of *De Haber* v. *Queen of Portugal*, 16 Jur. 164, it was held that an action cannot be maintained in any English court against a Foreign Potentate for any thing done or omitted to be done by him in his public capacity as the representative of the nation of which he is the head, and no English court has jurisdiction to entertain any complaint against him in that capacity.

(*b*) The Statutes relating to the Ordnance Department in Canada are 7 Vic., ch. 11, 9 Vic., ch. 42, and 18 Vic., ch. 91.

M'NAB v. ADAMSON.

Case for overflowing land by draining water back—What the issue on the pleadings.

Case for damming back waters on the plaintiff's land: *Held per Cur*, that upon the pleadings—as given at length below—the issue was *not* whether a dam which had been two feet high was made by the defendant three feet high, or being made by others of that height within twenty years was wrongfully continued by him,—*but* whether the prescriptive right, whatever it might be proved to be, had been exceeded within twenty years to the plaintiff's prejudice.

(Q. B., T. T., 14 Vic.)

The plaintiff declared in case for an injury to his freehold, lot No. 2, in the 11th concession of Esquesing, by damming up the water of the River Credit, and causing the waters to be penned back and to overflow his land.

The declaration contained two counts, in the first of which the plaintiff charged the defendant, as the occupant of the adjoining lot No. 11, with wrongfully raising in 1842 a dam, which had in 1825 been erected by one James McNab over the Credit, upon that lot, *of a certain height —to wit, of the height of two feet*, and increasing it, *to wit*, to the greater height of three feet; and it charged that the defendant also wrongfully tightened the said dam, and that he continued the dam so raised and tightened till the commencement of this suit, by means of which raising and tightening of the dam the water was penned back and caused to flow over and above the usual and natural water mark of the stream within the plaintiff's close, and occasioned the griveances complained of.

In the second count, the plaintiff stated, as in the first, his occupation of No. 12, through which the River Credit flows; the erection by James McNab on lot 11, lower down the stream, of a dam, in the year 1825, of a certain height, to wit, of the height of two feet, which remained of the height aforesaid till the time of committing the grieveances; that during that time the stream should of right have run and flowed, and did run and flow through the plaintiff's close uninterupted in its natural course, *otherwise than by the said dam of and to the height aforesaid*; and the plaintiff charged in this count, that on the 1st of March, 1849, one Barnhart wrongfully raised the dam *to a greater height, to wit, to the height of three feet*, and increased the length by twenty feet; and that this defendant, well knowing the premises on the day and year last aforesaid, and from thence, &c., wrongfully upheld and continued the said dam, whereby, &c.—alleging such injuries as were stated in the first count.

The defendant pleaded—1st. Not guilty.

2nd. That the plaintiff, by reason of his possession of the said close, was not entitled in manner and form, &c.

3rd to 1st count, a prescriptive right for twenty years to tighten the dam in that count mentioned, and to erect and continue erected divers boards, &c., being the dam in that count mentioned, over the stream, in the defendant's close, of the certain height, to wit, of the height of three feet above the bed of the stream, being the increased height in that count mentioned, for the due working of his mill; and that he, the defendant, did, at the said time when, &c., for the due and necessary working of his said mill, erect the said dam over the said stream on the defendant's premises, then being of a certain height, to wit, of the height of three feet above the bed of the stream, being the increased height in the first count mentioned, and tightened the dam as therein mentioned, but *without* raising or tightening the said dam *more* or otherwise than the same had during all the time aforesaid been used and accustomed to be built upon, raised, erected and tightened, which were the same grievances.

4th plea set up a prescriptive right in answer to the second count, in the defendant and all former occupiers of lot 12, &c., *to build upon the said dam now of the defendant, and to raise the same and increase the height thereof, to the height of three feet*, and to increase the length to the extent of twenty feet, being the increased height and length in the said second count mentioned, and to uphold and continue the same as therein mentioned in and over the said stream, &c., as often as occasion might require for the due working of his mill, and of penning back and raising the water, &c., as might be neccessary by the means aforesaid; and that having occasion for the due working of his mill, he, the defendant, did, on, &c., support, uphold and continue the last mentioned dam, then being of a certain height, to wit, of the height of three feet above the bed of the stream, being the increased height in the said count mentioned, and of increasing length, &c., being the length, &c, but without raising or lengthening the said dam or upholding or continuing the same beyond the proper length, height, size or dimensions thereof during the time aforesaid, or more or otherwise than the same had during all the time aforesaid been, and been used and accustomed to be raised, &c., or continued, which was the same supposed grievances, &c.

5th plea—a former recovery by the plaintiff for the same alleged injury.

6th—Statute of Limitations.

The plaintiff joined issue on the 1st and 2nd pleas, and replied to

3rd and 4th pleas that the defendant and others, the occupiers of said mill, &c., had not enjoyed as of right, and without interruption for twenty years, the right and easement, &c., in manner and form, &c.

To 5th plea, the plaintiff new assigned for injuries committed since he brought the action stated in the 5th plea; and to the 6th plea, that his action accrued within six years.

The defendant pleaded to the new assignment—1st, the general issue. 2nd—For a further plea to the causes of action newly assigned, so far as the same related to the 1st count, that long before and at the same time when, &c. (setting up a perscriptive right as before to do the acts complained of in the 1st count), and in the same terms denying any excess above the right acquired by prescription, and alleging that such raising, &c., are the supposed grievances newly assigned as to the 1st count.

And 3rd (to the new assignment), the defendant pleaded to the causes of action newly assigned, so far as they relate to the 2nd count, setting up a prescriptive right to do what was complained of in the 2nd count in the same terms as in the 4th plea, denying any excess of the prescriptive right, and averring that the acts so justified were to the supposed grievances newly assigned as to the 2nd count.

The plaintiff replied to these 2nd and 3rd pleas to the new assignment in the same terms—namely, that the defendant and all occupiers for the time being of the said mill, &c., had not nor had any of them, actually enjoyed as of right and without interruption for the full period of twenty years next before, &c., the right and easement in the said plea mentioned, in manner and form, &c.

At the trial, the question of fact was whether the certain repairs and amendments which the defendant had made to the stream in the summer of 1847, after the dam had been destroyed by a freshet, had had the effect of backing the water upon the plaintiff's land to an extent greater than had been the case before; and whether any injury had been occasioned to the plaintiff thereby since the recovery in the former action. Many witnesses were examined on both sides, and it was left to the jury to determine that question; and they were requested also to find whether the dam had been raised within twenty years to a height above three feet.

The jury found that the defendant's dam had been raised within twenty years, and was not three feet high twenty years before this action was brought, and they found for the plaintiff 20*l.* damages.

At the trial, the defendant's counsel contended that upon the pleadings the only question to be tried was whether a dam which had been

two feet high was made by the defendant three feet—or, being made by others of that height within twenty years, was wrongfully continued by him.

The learned judge held that the substance of the issue was whether the prescriptive right, whatever it might be proved to be, had been exceeded within twenty years to the plaintiff's prejudice.

Cameron, Q. C., obtained a rule for a new trial on the law and evidence and for misdirection. *Freeman*, of Hamilton, shewed cause. Authorities cited—1 Saund. 70, note (*a*).

ROBINSON, C. J., delivered the judgment of the court.

It seemed to be contended by the defendant's counsel on the argument of this rule, that the two feet and three feet mentioned in the pleadings were put in issue as strictly descriptive of the alleged obstructions, and could not be varied from in evidence; but we consider that the effect of the pleadings was to bring this question of fact in issue—whether the defendant had acquired by prescription a right to pen back the water to any extent whatever beyond the right acquired in McNab's time, whatever that might be—in other words, whether there was a second prescriptive right shewn as having accrued after McNab's occupation.

The plaintiff in his declaration admits a right in McNab to obstruct the flow of the river; and it is quite clear that he complains in one count of the defendant having wrongfully erected a dam which in its effects exceeded the privilege which he admits McNab to have rightfully enjoyed; and in the other count his complaint is that Barnhart had done him this wrong, and that this defendant wrongfully continued the nuisance.

The defendant on his part claims to have acquired a right by prescription in addition to what McNab had possessed; and we think the issue was not whether McNab had in one particular year—namely, 1823, which happens to be the one mentioned—put a dam which has been added to since by any erection either by himself or by others, beginning either beyond or within twenty years, such addition occasioning a greater obstruction of the water; but 1st, whether an undisputed privilege acquired by McNab has been exceeded by the defendant, either by an addition placed in the river by himself, or placed there by others and continued by himself; and if so, then, 2ndly, whether the defendant shewed a right acquired by twenty years' enjoyment to add to any extent to the admitted privilege of McNab. If we could say that he had shewn a right acquired to any extent by McNab's occupation, and distinct from his, then the defendant ought to have had a

verdict at the trial, though such right might not be established to anything like the extent to which the dam was raised by him in 1847. I mean, if he had shewn a newly acquired additional right, though but for one week beyond what the dam was in McNab's time, the defendant should have succeeded in these pleadings, because the plaintiff in his replication to the new assignment did not new assign for any excess, but wholly denied the newly acquired right—or rather any newly acquired right; for that we take to be the effect of his replication to the pleas to the new assignment.

But on an examination of the evidence, we find that it afforded no ground to the jury for declaring that there had been a twenty years' enjoyment before this action was brought of any greater privilege than had been exercised during McNab's occupation. Nothing done by the defendant or by Mr. Barnhart, or by any occupant subsequent to McNab went so far back as twenty years, and the acquisition of any right greater than McNab's was clearly negatived; so that we think that the jury properly found for the plaintiff, unless indeed we could say that the evidence shewed that there had been no such injury as the plaintiff complained of—that is, no greater overflow of water than McNab's claim had occasioned. Some witnesses seemed to be of that opinion; but, whatever may be the fact, it cannot be said that the evidence was not equally strong to lead to the opposite conclusion. The weight of testimony appeared to be on the side of the verdict.

Per Cur.—Rule discharged.

JOHNSTON v. BOYLE.

Public Road—How far gate thrown across it is conclusive as to road being public.

The placing a gate across a travelled road after the public have been enjoying it for upwards of twenty years, can never have the effect of abolishing a highway.

Semble, that a gate being kept across a road is not in any case *conclusive*, as to the road being a public one—the gate may have been there for the purpose of preventing cattle straying.

(Q. B., T. T., 14 Vic.)

The plaintiff declared against the defendant in a special action on the case, setting forth, that before and on the 1st January, 1843, there of right was, and from thence hath been and still ought to be, a common public highway in and through a close in the township of Markham, leading from a certain highway, being the concession road between the ninth and tenth concessions of Markham, through lot No. 23 of the said ninth concession, to a certain other highway, being the concession road between the eight and ninth concessions of Markham: that plaintiff was

lawfully possessed of a certain close near to the said highway leading rom the said concession road between the eighth and ninth concessions, and had no other means of access with his carriages, &c., to and from his close in and to the said concession roads, except through the said public highway leading from and to the said road between the 8th and 9th concessions of the said township; yet the defendant, well knowing, &c., on the 1st of January, 1843, and on divers other days afterwards, and before this suit, &c., obstructed the said highway by putting rails, bars, posts, &c., in and across the said public highway so leading as aforesaid, and continued the said obstruction from thence hitherto, by which the plaintiff has been prevented from using and going along the public highway so leading as aforesaid, and has been obliged to pass and repass to and from his said close into the said concession roads between the ninth and tenth concessions and the eight and ninth concessions of the said townships, by a very circuitous route, &c.

In the second count, the plaintiff declared that before and at the time, &c., he was and is still lawfully possessed of a certain other close, and that by reason thereof he, during all the time aforesaid, had and still ought to have a certain way from his said close *towards* a certain close in the township aforesaid, and into, through and over the same towards a certain common and public highway in the township aforesaid, and into the same, and from thence towards the close of the plaintiff, and unto and into the same, for himself, his servants, his horses, carriages, &c.; yet that the defendant, well knowing, &c., on 1st January, 1843, and on divers days between that day and the commencement of this suit, wrongfully stopped up the said way, &c., to the plaintiff's damage, &c.

The defendant pleaded—1st, not guilty, to the declaration.

2nd, to the first count, traversing the right of way in, through, over and upon the close in that count mentioned, leading from a certain public highway, being the concession road between the 9th and 10th concessions of Markham, across and through lot 23 of the 9th concession to the road between the 8th and 9th concessions, &c., *at the place* where the plaintiff so placed and erected the said boards, rails, &c.

3rd, to the second count the defendant pleaded, traversing in the same manner the plaintiff's right of way stated in that count.

The father of the defendant was originally the proprietor of the whole lot 23, in the 9th concession of Markham; but, many years ago, he sold to one Matthew Mills the west half of the lot. His son, the defendant, obtained from him and still holds the east half, which fronted upon the 10th concession line, except that within the east half, some distance

west of the 10th concession line, he, or rather his father, George Boyle, gave up to the public one acre of land for a burying ground, which was inclosed 16 or 17 years ago, at the expence of the people living in the neighbourhood, and had been used for many years before that as a burying ground. This small burying ground, which George Boyle excepted in the deed which he gave to his son, fronted upon a road leading across from the 10th concession to the 9th, through the centre of lot 23 in the 9th, which road had been generally used by all persons who desired to use it for any purpose, so long ago as 1805, having been, in the first instance, laid out by the assent of Mills, the proprietor of the west half, and of George Boyle, father of the defendant, proprietor of the east half of lot 23. The defendant was also owner of the east end of lot 24, in the 9th concession; and joining this piece of land on the west, the plaintiff Johnson had also a piece of land, on which he was living.

The defendant thus owning the land to the east and south of the plaintiff, it was impossible for the plaintiff to get to the 10th concession line, either through 24 or 23, without trespassing on the defendant, unless he could make out that he had a private right of way, such as he declared he had, leading from his house to the road running through lot 23, and leading from the 9th to the 10th concession, and unless, also, he could make out that that road, where it led past the burying ground to the 10th concession, was a common public highway which neither the defendant nor any other person could legally shut up. He gave evidence to shew that the road through the centre of 23, from the 9th to the 10th concession, was a legal highway—first, because it was expressly dedicated to the public as such, by George Boyle, when he was owner of the fee; secondly, because from the long user a dedication might be presumed, if it were not clearly proved.

Verdict for plaintiff—1*s.* damages.

Dr. Connor obtained a rule for a new trial for misdirection, for the rejection of proper evidence, and because the verdict was rendered against law and evidence. He cited 5 Taunt. 124; 11 M. & W. 827; 5 B. & Al. 457; 2 Saund. 176 (m); 6 Q. C. R. 914; 11 Ea. R. 376; 4 B. & Al. 450; 7 B. & C. 260.

Cameron, Q. C., shewed cause. He cited, 17 Law Jl. Q. B. 177; Sayer 98, 301; 1 C. & K. 54; 3 Bing. 447; 8 A. & E. 99; 1 M. & Gr. 392; 11 M. & W. 827; 5 Taunt. 124; 1 Taunt. 279; 1 Camp. 263.

ROBINSON, J. C., delivered the judgment of the court.

Upon full consideration of the evidence given in this case, we are all satisfied with the verdict. If the plaintiff shewed a right to recover in

respect to the obstruction of either of the ways in question, it would be enough—for the jury gave but nominal damages. The evidence given by R. Graham, George Boyle, Miller, Degear, and Sharer was ample to support the presumption of a dedication of a highway through the centre of the lot, from west to east, between the 9th and 10th concessions.

A road, it is sworn, has been always used there by the public generally, from 1805—intended to be straight, though not actually so from the first, but made straight from time to time, as circumstances admitted, in the progress of clearing the land. This road, it seems, the defendant stopped up about seven years ago, by placing bars across its entrance into the 10th concession line; but it had been used up to that time by sleighs and waggons, by all who had occasion to use it for thirty-seven years, and it was a thoroughfare leading from one highway to another. Miller says he travelled this road before the war of 1812, and never saw a fence across it till five or six years ago. Degear speaks of it from 1804 to this time, and says he first saw a fence across it in 1838, but that it had been then used by the public more than thirty years.

It is true that at one or more times within that period there seems, according to some of the witnesses, to have been occasionally a fence across this road at Miller's, near the middle of the lot, not intended to shut out the public—for everybody passed notwithstanding—but only to keep in his own cattle; for at an early period it was reasonable that the occupant should take such means of confining his cattle and protecting his crops, since it could hardly be expected that he would at once fence in the whole of the lot on both sides.

On this point, what is said by Lord Denman, in *Davies* v. *Stephens*, 7 Car & P. 571, is satisfactory; for where a road had been allowed to be used, as in that case, but it appeared that gates had been kept sometimes locked across the way, and the road had never been known to be repaired by the parish, Lord Denman said that no repairs being made by the parish was a circumstance from which the jury might infer it was not a public road, because the parish was bound to repair all public roads; and he added "that a gate being kept across it was also a circumstance tending to shew that it was no public road; but *not a conclusive one*, for that a road may have originally been granted to the public reserving the right of keeping a gate across it to prevent cattle straying."

In the case before us, there was much evidence of statute labor having been done on this road, and on the very part now obstructed by the defendant, and done by those who owned the land through which the road is.

As to the placing a gate at the concession line—and that could never have the effect of abolishing the highway after the public had so long enjoyed it—I refer to 4 Ad. & Ell. 713, 8 A. & E. 105.

As to the private way leading from Johnston's house to highway between the 9th and 10th concessions, very little is said respecting that by the witnesses, but I do not see that we could properly find fault with the verdict as regards that alleged private right of way; and at any rate the damages given being nominal, and the plaintiff's right to recover in respect to the obstruction of the other way being, as we think, established, we should not set aside the verdict on account of any doubt we might have respecting the right to recover on the second count. We think the learned judge was right in holding that the evidence which the defendant desired to give respecting the plaintiff denying him access to the water on the plaintiff's land, which he used so enjoy, could not affect the issue upon the second count, the two privileges not being shewn to be dependent one on the other.

It was fairly left to the jury, upon the evidence, to find whether there had been an actual enjoyment of a private right of way from the plaintiff's house through the defendant's land to the public way on lot 23, leading from that lot to the 10th concession; the jury found there had been such enjoyment for more than 20 years; and there was such evidence, we think, as warranted them in so finding.

Per Cur.—Rule discharged.

Doe dem. Short v. Bass.

Erroneous survey—12 *cl.* 59 *Geo. III., ch.* 14.

Upon the facts of the case, (given at length below,) it *was held per Cur.*, that they had no authority under the 12th cl. 59 Geo. III., ch. 14, to stay the proceedings until the defendant received the value of his improvements, or until the plaintiff conveyed the land in dispute.

(Q. B., T. T., 14 Vic.)

Ejectment for a strip of land off from the east side of the east half of No. 14, in the 7th concession of Edwardsburgh, six rods wide, in front of the seventh concession, running 245 rods on each side of said strip towards the rear of the said seventh concession, and 23 rods wide in rear of the said 245 rods.

At the trial, at the assizes in April, 1850, before Draper, J., it appeared that lot No. 14, in the 7th concession of Edwardsburgh, was granted by the Crown to William McGennan, by letters patent, dated 17th November, 1846.

On the 25th March, 1847, William McGennan conveyed the east half of this lot to the lessor of the plaintiff.

For the defence it was shewn that the Crown, by letters patent, dated 16th February, 1816, granted No. 13, 7th concession of Edwardsburgh, to James D. Macklemoyle, who, on the 31st August, 1827, conveyed the same lot to the defendant, and that defendant has ever since lived upon that lot. One Fraser, who was sworn to have acted as a surveyor, but was not otherwise shewn to have been a licensed surveyor, was stated to have been employed more than twenty years before the trial, and before the running of the line which plaintiff contended was correct, and to have run a line as a side line between Nos. 13 and 14, 7th concession Edwardsburgh; and defendant by degrees, year after year, cleared up to that line, going farther and farther from the front towards the rear. A new line was run about June, 1849, by one Rath, who was employed by the lessor of the plaintiff. According to the evidence, there was a quantity of 23 acres, one rood and five perches of land, which had been cleared by the defendant, and which lay between these two lines—the defendant treating Fraser's line as the boundary between the two lots, though the correctness of that line had been questioned for seven or eight years back, and having sown a crop of wheat on the disputed land since Rath's survey. It was not disputed at the trial but that the defendant had cleared on, and was in possession of a part of No. 14; and the consent rule in effect admitted that he defends for a part of that lot. Evidence was given on the part of the defendant to establish the value of his improvements, and the value of the land itself, the defendant claiming the advantage of the statute 59 Geo. III., ch. 15, sec. 12. No proof was given at the trial that notice had been given to the lessor of the plaintiff at the time of entering into the consent rule, pursuant to the 2nd Vic., ch. 17, sec. 2.

The jury were directed to find for the plaintiff, and were also told to treat the evidence as establishing a clearing by mistake, owing to unskilful survey, though doubt was expressed of the sufficiency of the evidence for this purpose, as there was no proof where the true line between these lots runs, and consequently no certain data to shew how much of lot No. 14 defendant has improved.

The jury found for the plaintiff; and also stated that they valued the defendant's improvements as worth fifteen shillings per acre over and above the value of the land, which they valued at ten shillings per acre; but stated their inability, on the evidence, to determine the number of acres.

Leave was reserved to the defendant to move to stay execution until

the plaintiff should pay to the defendant fifteen shillings per acre, or if he elected to convey the land, to give the defendant an opportunity of tendering the price of ten shillings per acre and getting a conveyance; and it was recommended to both parties to agree on having the quantity ascertained by a sworn surveyor.

In easter term *Richards* obtained a rule *nisi* to stay the issuing of an *hab. fac. pos.*, until the lessor of the plaintiff should pay or tender to defendant the damages assessed by the jury as the value of his improvements, or until the defendant should pay the lessor of the plaintiff for twenty-two acres and two-tenths, or such other quantity as the court might direct, at the rate per acre assessed by the jury; or for a new trial, there being an insufficient assessment of damages, and the verdict being contrary to law and evidence. In support of his motion, he filed an affidavit, of a deputy provincial surveyor of the contents of the strip of land defended for, according to the description contained in the consent rule, and an affidavit of the defendant that the lessor of the plaintiff had not paid or tendered him anything in payment, or offered to convey on being paid.

ROBINSON, C. J., delivered the judgment of the court.

We do not consider that, on the facts of the case, we have authority to stay the proceedings until the defendant receives the value of his improvements, or until the plaintiff conveys the land in dispute. The 12th clause of 59 Geo. III., ch. 14, on which this application is founded, only restrains the plaintiff from taking out his writ of possession in cases where there has been an accurate adjustment of the boundary according to the provisions of that act, and when an error has been ascertained with such survey. (*a*)

Now, it appears there has not yet been such a survey made, or at least none was proved on the trial, and it is confessedly uncertain altogether, on the evidence, how many acres of the plaintiff's lot have been improved and are occupied by the defendant. It is impossible, therefore, for us to know what sum should be tendered under either alternative of the statute, for the jury only assessed a certain value per acre, and the number of acres is unascertained. We do not think we should grant a new trial in order that this may be ascertained; for if the defendant had made up his mind to admit a trespass on his part, to a definite extent, he should have given fair notice of that in conformity to the statute 2 Vic., ch. 17.

(*a*) See the case of *Doe dem. Moule* v. *Campbell*, *ante* page 824, and notes appended thereto.

There is little reason to suppose that any hardship will arise to the defendant; for, according to the evidence, he had been long enough in possession of the plaintiff's land to compensate him well for clearing it, though some extraordinary opinions on that point were given on the trial, by some of his witnesses, who seemed to think that no length of enjoyment whatever would recompence a man for clearing land of its timber.

In all cases to which the statute 59 Geo. III. applies, the more proper course would seem to be to leave the plaintiff to act at his peril in suing out his writ. Nothing is said in the act about this court staying proceedings; and where the case is one clearly under the act, it is for the plaintiff, with whom the option must be, to make his tender of a deed on receiving the price, or of the value of improvements; for the defendant can never be forced to purchase the plaintiff's land, whether he desired it or not; and the plaintiff, besides, may not be able to make a clear title; and if the plaintiff, without having offered to do either one or the other, shall nevertheless sue out his writ contrary to the act, then the defendant can obtain redress by application to the court. I do not, however, say that we may not, in a clear case, interpose, as we are desired to do here, and it may be more convenient to do so than to wait till a writ has been sued out and the defendant perhaps dispossessed under it.

Per Cur.—Rule discharged without costs.

DOE DEM. DOUGALL V. FANNING.

Registry Act* 9 *Vic.*, *ch.* 84, *clause* 13—*Docketting of judgment—registry of judgment as to binding lands.

Under the operation of the 13th clause of our Registry Act 9 Vic., ch. 84, lands are bound upon the registry of the judgment—the mistaken reference in the clause to the docketting of judgments in England, being considered by the court a mere false illustration of what was plainly provided for before.

(Q. B., T. T., 14 Vic.)

It appears from the learned judge's report of this case, that Agnes Smith having judgment in her favour in an action of dower, had her dower in the estate in question in this action assigned to her by the sheriff, upon the proper writ for that purpose, some time in 1844; and that on the 3rd April, 1848, she sold and conveyed the estate so meted out to her to the defendant, who had his deed registered on the 22nd of January, 1850.

The question was, had the plaintiff shewn a better right? His judgment was registered on the 7th of April, 1847, but he had not put his

fi. fa. against the lands into the sheriff's hands till the 20th December, 1848, eight months after Mrs. Smith had conveyed away her estate.

ROBINSON, C. J., delivered the judgment of the court.

According to decisions of this court, pronounced by our predecessors and long acquiesed in, the land was not bound before the delivery of the writ to the sheriff—that is, it was not bound by the judgment (I speak now without reference to the late act registering judgments); but it was necessary, as in the case of goods, that a writ should first come to the sheriff's hands. (*a*)

The grounds on which this court did so decide at an early period will be found stated in several judgments, which we consider to be binding upon us; and we have therefore only to consider the effect of the 13th clause of our Registry Act 9 Vic., ch. 34. We are of opinion that under the operation of that clause, the land was bound upon the registry of the judgment—that is, from the 7th of April, 1847—and consequently that the defendant's title under Mrs. Smith's deed, made in December, 1848, fails; and the verdict must be entered for the plaintiff.

The 13th clause does, it is true, provide that judgments registered under that act, (which the plaintiff's judgments was,) shall bind the lands from the time of recording the same in the register for the county wherein the lands lie, *in like manner as the docketting of judgments in England, affects and binds lands*, which was an unfortunate expression, for at that time, strictly speaking, there could be no binding of lands by docketting of judgments in England, what was called docketting having been done away with by the Imperial statute, 12 Vic., ch. 110. (*b*)

The defendant's counsel upon this argues that judgments here can therefore not bind at all, because it is not possible that they can now bind lands in the same manner as judgments docketted in England, where none are docketted at the present day; but we think we must deal more reasonably with the statute 9 Vic., ch. 34, the misconception being evident, and the intention being clear that the registry here shall bind from the date, which is substantially and indeed in words provided for, the only error being in supposing that judgments are now docketted in England, and are bound from the date of docketting.

(*a*) In *Doe dem. McIntosh* v. *McDonell*, and *Auldjo* v. *Hollister* (MS. Rep.), it was held that lands were bound only from the delivery of the writ against them to the sheriff, and that a judgment was no lien upon them; and in *Doe dem. McPhereon* v. *Hunter* (4 U. C. Q. B. 449), it was held that where a party purchases land upon which a judgment had attached, he holds the land subject to a right of sale under a *fi. fa.* by the judgment creditor.

(*b*) See also the case of *Doe dem. Dempsey* v. *Boulton* (9 U. C. Q. B. 535).

This mistaken reference has only led to a false illustration of what was plainly provided for before. We may suppose the legislature either to have referred to the kind of registry which the Imperial statute 2 Victoria has substituted for docketting, as being in itself really a docketting, though called by another name in the act, or that they meant only to provide that our registry of judgments should bind from the date, as the docketting in England did while judgments were docketted; or (what in truth may be said without inccuracy) as judgments which remain docketted there, bind from the time of their having been docketted.

The circumstance of more than a year having elasped between the registry of the plaintiff's judgment and his putting his execution into the sheriff's hands, raises no difference, in consequence of what is provided in the end of the 13th section, because this is not a contest between persons claiming under different judgments. If it were, we should have to consider what is meant by that provision, and that does not seem to me to be very obvious. (*a*)

Per Cur.—Postea to the plaintiff.

BYRNES V. BOWN.

12th clause of Highway Act, 50 Geo. III., ch. 1—As to what constitutes a public road running through Indian lands.

The 12th clause of the Highway Act, 50 Geo. III., ch. 1, cannot be taken to mean that every bye-road or short cut used by the Indians across the plains or flats, is to be established as a permanent highway. It only means, that roads which, under the provisions of that act, are to acquire the character of legal highways should have that same legal character where they passed through Indian lands as in other parts of their course, although they might not be (as to such portion of them) public allowances made in any original survey, nor had any public money been expended or statute labor performed on them.

(Q. B., T. T., 14 Vic.)

Trespass *qu. cl. fr.*, describing the close as abutting on the north-west by the Grand River, on the south-west by a certain close or field known as lot number seven, on the south-east by a certain other close or field known as lot number eight, and on the north-east by a certain close or field known as lot number eight, and on the north-east by a certain close or field known as lot number seventeen, in what is called the Ox-bow Bend, in the township of Brantford. The declaration contained only one count in the common form, for treading down the grass, subverting the soil, &c., breaking gates, prostrating fences, &c.

(*a*) The reader will find a long article upon the Law of Registered Judgments in 5 U. C. L. J. 198, in which are collected all the reported cases bearing upon the question.

The defendant pleaded :—1st, not guilty.

2nd, That the close was not the plaintiff's.

3rd, That the gates, locks, fences, were not, at the time when, &c., the property of the plaintiff.

4th, He justified the entry and right of common and public highway through the close, and pleaded that he removed the gates, fences, &c., because they obstructed the highway.

5th, That there was before and at the time when, &c., a common public highway in, through and over the said close; that before the said time when, &c.—viz., on the 8th of August, 1843—the District Council of the District of Gore enacted a by-law that pathmasters, (meaning thereby the overseers of highways,) in their respective beats or districts, should remove any nuisance or obstruction which might be placed or remain in any highway; that after the passing of the by-law and before, and at the said time when, &c., the defendant was a pathmaster, and overseer of highways, duly appointed for that part of the township of Brantford in which the said close is situated, and that the fences, gates, &c., of the plaintiff having been wrongfully erected, and being then standing in the said highway and obstructing the same, the defendant, as overseer and under the authority of the said by-law, entered upon the said highway in the said close, &c., for the purpose of removing the said obstructions, and removed the said fences, &c., doing no unnecessary damage, &c.

The plaintiff joined issue on the 1st, 2nd and 3rd pleas; replied to 4th plea, traversing the right of way alleged; and to the 5th plea, that at the several times when, &c., there was not, nor of right ought there to have been, a common and public highway into, through, over and along the said close in which, &c., as the defendant hath in that plea alleged, &c.

Verdict for the plaintiff, 6*d.* damages—the jury finding that there was no public highway, nor any right of way in the place in question.

The defendant obtained a rule for a new trial on the law and evidence.

ROBINSON, C. J., delivered the judgment of the court.

We have considered the evidence and are all satisfied with the verdict. The case turns altogether on the evidence, and it went properly to the jury. The plaintiff is contending for nothing unreasonable; but what the defendant, on the other hand, wishes to establish has the appearance of being extremely unreasonable. It is proved that the road which the government has directed to be laid out, along the bank of of the river running in the same direction and at a short distance from the other, is on ground more suitable for a road, and is equally conve-

nient for the public; but the defendant would nevertheless insist on a continued right of passage through the centre of the plaintiff's fields in addition to the highway which the government has laid out, to connect the same points.

If the evidence had been such as to give quite clearly the character of a legal highway to the Indian road or path in question, so that there was really no question of fact for the jury to consider, then the plaintiff must have submitted, though it would have seemed harsh in any one to desire to subject him to the inconvenience of having this road run through his farm without any particular advantage accruing from it to the public. But the evidence well warranted the conclusion which the jury came to, that there was no public highway, not any right of way in the place in question. There had been a road, it appears, for some years, leading through what is now the plaintiff's land—a more principal road than many others which led from different Indian houses into it—while the whole was an Indian settlement. But still this was a road not always allowed to lie open to the public, but only in the winter season, when no damage could accrue to the Indians living there from its being travelled.

In the summer, the Indians, it was proved, generally kept up a fence across the neck, thereby enclosing the flats within the bend of the river, which were usually planted with corn. The *locus in quo* is within the tract from which the public were commonly shut out in the summer by this fence. It was sworn that it was so enclosed generally in summer up to the time of this plaintiff becoming the proprietor, which was five or six years ago. He shut up this alleged road, leaving, however, a road to run parallel with it, near the bank of the river, which the government, in laying out and disposing of the land for the benefit of the Indians, have desired to substitute and establish as the public road.

Reliance has been placed on the 12th clause of the Highway Act, 50 Geo. III., ch. 1, as having the effect of making this a permanent road. That enacts that any roads whereon public money has been expended or statute labor usually performed, *or any roads passing through Indian lands*, shall be deemed common and public highways. But it never could have been meant by that clause that every bye-road or short cut used by the Indians across the plains or flats was to be established as a permanent highway, even though they should be roads only left open during the winter. The meaning of that clause, I think, is, that roads which, under the provisions of that act were to acquire the character of legal highways, should have that same legal character where they passed through Indian lands as in other parts of their course,

although they might not be (as to such portions of them) public allowances made in any original survey, nor had any public money been expended or statute labor been performed on them.

So long as any portion of the public lands has not been surveyed or organized, and generally indeed as to all lands before they are in great part cultivated and enclosed, people pass freely wherever it suits their convenience, and great inconvenience and injustice would follow if every such temporary road must become a permanent highway. Intention to dedicate and a variety of circumstances are to be considered in each case, and any attempt or claim which is unreasonable should be discountenanced by courts and juries.

Per Cur.—Rule discharged.

FERRIE v. JONES (EXECUTOR).

Books of agent of public company—How far admissable in evidence to charge surety on his bond for defalcation of agent, agent being alive.

Held per Cur., (ROBINSON, C. J., *dissentiente*,) that the books of the agent or clerk of a public company, *during his life time*, are not good evidence *against his surety* sued on his bond for a deficiency in the agent's accounts.

(Q. B., M. T., 14 Vic.)

Debt on bond.

The plaintiff sued as Chairman of the Committe of the Canada Inland Forwarding and Insurance Company, under authority of our statute 7 Vic., on a bond made by the testator on the 30th of April, 1833, in 2000*l.* penalty, with a condition that one William Whiting should faithfully discharge his duty as agent of the said company, and should properly apply all such monies as should come into his hands as such agent, and render a just account of the same when requested, according to the deed of association of the said company.

The plaintiff averred that Whiting entered on the duties of his office on the day of making the bond, and continued therein for a long time —viz., two years; that he had custody of all the books, accounts, bills, notes, monies, &c., of the company at Montreal, and that between the 1st of May, 1833, and the 30th of April, 1835, and during the lifetime of the testator, he received, as such agent, divers monies of the company —viz., 2000*l.*, for and on their account, yet that he did not truly apply the same or render a just and true account of the same, as required by the condition, although requested by the plaintiff—viz., on the day and year last aforesaid; but, on the contrary, before the 9th of December, 1843, converted the monies to his own use; and concluded that neither

the testator in his lifetime, nor his executors since his death, have paid the same.

Pleas—1st, that Whiting did not receive, as such agent, the sums of money in the said plea mentioned, or any part thereof.

2nd, That Whiting did truly and honestly apply all the monies which came into his hands as such agent, and did render a just and true account of the same according to the condition of the bond.

3rd, *Non est factum.*

4th, After setting out the bond and condition on oyer, the defendant pleaded as to 1000*l.*, half the penalty, "the defendant says that the writing obligatory and condition thereof were executed by the testator at Montreal, in Lower Canada, and by Horatio Gates, as sureties for the said Whiting, and that by the law of Lower Canada any person making any bond with another person, as sureties for the acts of a third person, is liable only for one-half of the penalty in such bond mentioned."

The plaintiff joined issue on 1st, 2nd and 3rd pleas, and traversed the allegation as to the law of Lower Canada in the 4th plea.

At the trial, it was proved that Mr. Whiting, in 1833, soon after the making of the bond, entered on the discharge of his duties as agent for the Company at Montreal, where he had the entire management of the affairs of the company; that he continued in the office through 1833, and till August, 1834, when the company became dissatisfied on account of some deficiencies of money, and the chairman and a clerk of the company took the control. It was proved very clearly that he must have received monies to a large amount. The chairman of the company brought an action against him for his deficiencies, and a reference to arbitration took place. Three merchants, as referees, undertook the examination of his accounts; Mr. Whiting laid his accounts before them, his clerks were examined, and he himself frequently attended the arbitration. The result of this examination was that the arbitrators found 2128*l.* 10*s.* 11*d.* due by Whiting to the Company as a cash deficiency, exclusive of any charge of interest. This was in May, 1838.

The witness who proved this was one of the arbitrators; and besides this evidenne of the result of an examination of Mr. Whiting's accounts at the arbitration, he proved one payment of money made by himself into Whiting's hands for the company and not accounted for, of 294*l.* 13*s.* 3*d.* About the proof of this there could be no dispute; but it was objected that, as to anything besides, the evidence was inadmissible and insufficient to charge the surety; that the data on which the arbitrators arrived at their conclusion must be shewn; that any admissions of Whiting, either by his conduct, or verbal statements, or entries in

his accounts were not legal evidence to charge his surety, because Whiting is still living, though resident in a foreign country, somewhere in the United States of America. The arbitrator (who was himself managing agent for the company at another place) swore further, that the arbitrators and a book-keeper employed by them had Mr. Whiting's cash books and ledgers before them and that the sum of 2128*l.* 10*s.* 11*d.* was the sum that appeared to be due by him, for cash received above what he had disbursed, according to the books which he had laid before the arbitrators, and which were in fact the books of the company kept by him as their agent. The submission to arbitration was by rule of court in a cause pending. The arbitrator swore that he believed they investigated all the accounts; that the sureties were aware of the arbitration; that the testator, one of the sureties, frequently spoke to him about the matter after their award was made; that an award was made and signed, which however was not produced on the trial, but only the minutes of the proceedings of the arbitrators and of the result.

A witness was called who had been clerk in the office under Whiting. He swore that Whiting had control of the cash book which the witness kept under his direction—the account in the bank being kept in Whiting's name, and the money drawn out on his cheques. This clerk swore, that when the chairman and he took the management, and when Mr. Whiting's agency ceased, there was no apparent deficit of cash, as shewn by the books, of 1045*l.* 17*s.* 6*d.*; and that he had no doubt there was that deficiency after all charges made against it. Mr. Whiting, after leaving the office, made up an account by which he admitted a deficiency, on the 31st of March, 1835, of 816*l.* 2*s.* 1*d.*

It was proved to be the law of Lower Canada, as pleaded in the defendant's fourth plea, that in case of a joint bond by two in a certain penalty, a moiety only of the damage proved can be recovered against each.

The jury were allowed to take out with them the books and accounts produced. The learned judge considered the evidence of Mr. Morris, the arbitrator, admissible; and thought, that even restricting the testator's liability as surety to one half of the deficiency, it would seem to establish a claim to at least 1000*l.* The jury gave a verdict for that sum, founding it, as they said, in part on the testimony of Mr. Morris.

Verdict for the plaintiff on the 1st, 2nd and 3rd issues, and damages assessed on the breach at 1000*l.*; for the defendant on the 4th issue.

Cameron, Q. C., obtained a rule for a new trial on the ground of misdirection, and the admission of improper evidence. He cited 5 Esp. C. 26; 1 Stark. 192; 2 Campb. 92; 5 Bing. N. C. 381.

Vankoughnet shewed cause. He cited 3 B. & B. 132; 8 B. & C. 556; 10 B. & C. 317; 11 C. & F. 85; 8 Jurist, 667; 16 M. & W. 321; 8 Q. B. R. 174; 6 M. & Gr. 261; 2 Q. B. R. 203; Stark. Ev. 1 vol. 69.

ROBINSON, C. J.—Unless it should appear clear to us that the evidence legally given in this case was insufficient to support the verdict, or that illegal evidence important to the plaintiff's case was improperly admitted, we ought not to make this rule absolute—for it is a strong circumstance in favor of the plaintiff that the surety was aware of the defalcation imputed to the principal, and of the investigations of which were going on openly upon production of his accounts, in order to ascertain the amount for which he was accountable. He was deeply interested in what might be the result of the investigation, and had the opportunity of watching it while in progress, if he thought it necessary for his protection. It was sworn further, by Mr. Morris, that after the award was made, the surety (Mr. Jones) frequently spoke to him about it. If Mr. Morris had been pressed, he could probably have stated whether Mr. Jones expressed any doubt as to the justice of the award, or whether he appeared to acquiesce in it. And his answers to such inquiries might have brought the case within the principle on which *Ward* v. *Suffield* was decided, 5 Bing. N. C. 381. The evidence actually given, however, would not seem to have warranted a verdict for the plaintiff on that ground. But, in my opinion, the books kept by Mr. Whiting were admissible in evidence against his surety, and being admitted they shewed a right to recover for at least the amount of the verdict. The only ground for doubt is from the fact that Mr. Whiting, the agent or clerk of the company for whom Mr. Jones was bound as surety, is still living, and therefore, as the defendants contend, ought to have been produced. If that were clear under the circumstances of this case, then I assume that his residing in a foreign country would not dispense with the necessity for obtaining his evidence; for that point seems clear.

I think it results, from a fair consideration of the cases of *Goss* v. *Watlington*, reported in 3 Br. & Bing. 322, and in 6 Moore 355; and *Whitnash* v. *George et al.*, reported in 8 B. & C. 556; and in 3 My. & Ry. 42; and *Middleton* v. *Melton*, 10 B. & C. 317; that the books kept by Mr. Whiting were properly admitted, and were evidence against the surety, and conclusive evidence till controverted. It is true that in all those cases the principal was dead, and could not therefore be examined; and treating his accounts, containing entries made by him charging himself, as admissions, they were the admissions of a deceased person. There is not that ingredient in the present question.

But I do not take any of the three cases to have been decided on that ground. In *Gore* v. *Watlington*, which is the case most closely resembling the present, Watts, a collector of rates, for whom the defendant was surety, had, in the public books kept by him, charged himself with certain sums as received by him, and these books were received as evidence in the action against the surety. Watts was dead, and on his decease the books had been handed over to his successor. Dallas, C. J., did not found his judgment on the circumstance that Watts was dead. He said, "Watts has bound himself for the due delivery over to his successor of these books as public books; and by the delivering them over to his successor, with payments marked in them, they thereby became evidence against him; and that the marks made by Watts, ticking off the persons assessed, are, as an entry in a public book, evidence against the sureties."

In the case before us, Mr. Whiting, being still living and charged with deficiencies, produced the books himself, which makes the case stronger. I consider these books public books. The corporation is one created by the legislature for a purpose beneficial to the public; the act is a public one; the agent was appointed under its express authority; and accounts of the affairs of the company are required to be annually laid before the legislature. The surety bound himself that Whiting should faithfully discharge his duty, and *should render a just account of all monies* which should come into his hands as such agent when required, and that he should properly apply all monies received by him. The breaches in this declaration are, that he received divers large sums of money and did not truly apply them; and that he did not render a just and true account of the monies received by him. What was said by the court in *Whitnash* v. *George*, applies more strongly here. Either those accounts so deliberately rendered by him to his employers on giving up his trust, and after his conduct had been questioned, were true accounts or were not—if they were true, they shewed that he was indebted to the company in a certain large sum; if they were not true accounts, then he had failed to render such accounts as his surety engaged he should render.

That class of cases does not apply in which goods had been furnished to one person on the guarantee of another, and in which it has been held that the sale and delivery of the goods in an action against the guarantee cannot be proved by admissions of the principal, but must be proved as in other cases. There is no hardship in this, because there is no reason why the vendor should not be prepared to prove the sales made by himself in such a case, as well as in others. But the manag-

ing agent of this company is placed in a situation of trust and confidence, where every thing is managed by himself and known to himself; he represents the company, which takes such accounts as he rendered them, and his admissions of payments are binding on them, and preclude their recovery against the parties whom he has credited in account.

In many cases, as for instance the case of a ferryman or toll-keeper, where money is paid at the time and no charges made against any one, if the accounts kept by the party of the amounts collected by him were not to be admitted as evidence against a surety who has become bound for his faithful performance of the duty, and for his duly accounting, there would be little use in taking security.

I have found no express dictum or decision that, in a case like the present, the books of the principal, by which I mean not mere private memoranda or entries for his own use, but his official accounts as between him and his employers, would be evidence against his surety while he is living; but that is fairly, I think, to be deduced from the cases I have cited, and the grounds on which they were stated to be determined, although in each of those cases the fact happened to be that the principal was dead. The contrary decision would be so unreasonable that I could never reconcile myself to it, though I should probably feel myself bound to adhere to it if the principle seemed to be clearly settled; but before I can so decide I must see express authority to that effect.

An officer of a public company is charged with deficiencies and being called upon produces his accounts, which shew a large amount of money received for which he has not accounted, and in consequence he is dismissed. The surety, who was bound that he would truly and faithfully account and pay over, is called upon to make good the deficiency thus acknowledged by his principal, by his accounts publicly rendered. It is contended that the principal, must be called to prove those deficiencies on oath. If he should be called and should swear that he had received nothing, which should be credited, his own accounts kept while in office charging himself and discharging the company's debtors, or his evidence after he had been dismissed declaring that those entries were false? I consider that his accounts were properly received in evidence, though I cannot but feel that the point is left upon unsatisfactory ground.

DRAPER, J.—The general rule of evidence is thus clearly laid down by Parke, J., in *Middleton* v. *Melton*, "that fact must be proved by testimony on oath." He next states an exception to this rule—viz., "that an admission of a fact *made by a deceased person*, which is against the pecuniary interest, or rather interest of a pecuniary nature

—*Davis* v. *Lloyd*, 1 C. & K. 276; and the *Sussex Peerage* case, 11 Cl. & Fin.—of the party making it at the time, is evidence of that fact as between third persons." And then referring to the case of *Goss* v. *Watlington*, and *Whitnash* v. *George*, he remarked that the entries were held admissable upon the ground that they were made in books which it was the duty of the principal to keep, and for the performance of which duty the defendant had become bound. "But," he adds, "I think those decisions may be supported on the more general principle, that an entry made by a party cognizant of a fact and having no interest to make a false entry whereby he charges himself with receipt of a sum of money, is evidence of the fact of the receipt of such money."

This latter observation clearly involves the assumption of the death of the party, before entries made by him would be evidence; and, in each of these cases, the admissibility of such entries was denied on the part of the defendants, though their principal was dead, and that fact is referred to by the court, in giving judgment, as one of the grounds rested upon, which appears to me conclusive that it was not then taken to be law that such entries would have been admissible if the principal were living.

For if the rule had been, that the entries of a principal, made in the regular course of his employment and duty, were, during his lifetime, evidence to charge his surety, it surely would not have been contended that they ceased to be evidence by reason of his death, nor would the court have referred to his death as having any *bearing* upon the question of the admissibility of such entries.

In a note to Phillips on Evidence, 8th ed., p. 411, and also in the text in page 311 of the same work, these cases are cited as authorities for the position, that the entries of *deceased* principals are evidence against their sureties; and in the note referred to, it is said that Mr. Baron Bayley held that a written admission of sums received by a clerk was not evidence against a surety in an action brought by the master upon a bond of indemnity.

The only case I have met with which throws a doubt upon this is *McGahey* v. *Alston*, 2 M. & W. 206, in which, in a joint action against principal and surety, the accounts of the principal had been received in evidence, as was said to charge the surety, and a rule to shew cause was granted on this point; but, on reading the report of the trial, it appeared other evidence was given, and so the point was not discussed, though the observations of Parke, B., might lead to a supposition that he did not consider the previous decisions to rest upon the death of the principal.

Up to this case, it appears to me the leaning of the authorities is decidedly against the admission of the evidence, and I do not find any decision since this case strengthening the doubt which is thereby suggested, and sufficient to warrant an entire departure from the general rule, that a surety has a right that the defaults of the principal with which he is charged shall be proved upon oath, though not necessarily by his oath, for other witnesses may give the necessary proof.

In the absence of clear authority to the contrary, I think this rule should be upheld, and the exceptions introduced to it not further extended; and therefore that the rule for a new trial should be made absolute.—*Lysaght* v. *Walker*, 5 Bligh's N. S. 1.

BURNS, J.—After giving this case the best consideration I can, I have been unable to bring myself to the conclusion that the evidence was properly receivable. I have examined all the cases carefully, and in every one of them in which the evidence of the principal was received —that is, what would have been good evidence as against himself when offered against the surety—has only been offered after the death of the principal. The general rule is, that no evidence shall be given against a person where it is not given under the sanction of an oath or its equivalent, and that the witness should be subject to the ordeal of a cross-examination of the party against whom he is called. The admission of testimony contrary to this rule is the exception, and the question is whether what the plaintiff seeks to do comes within any of the exceptions, or whether it is now to be make an exception. I do not think the case comes within any exception already established, and I do not think we are warranted in extending the exceptions.

Besides the cases mentioned, I would name that of *Lysaght* v. *Walker*, 5 Bligh's N. S. 1, which is not mentioned in any work of evidence that I know of. It was an appeal from Ireland upon a special verdict in an action against the surety, who was responsible for his principal accounting for monies received by him as agent for the plaintiffs. In the special verdict, it is set out that the principal was dead, and the evidence offered against the defendant was an account made out by the principal, in which he shewed himself indebted to the plaintiff. The judgment of the House of Lords does not touch the point in question; but it is not unworthy of consideration that it was argued, that, notwithstanding the death of the principal, the evidence to charge the surety was insufficient. I supposed it must have been considered that the case of *Goss* v. *Watlington*, and that class of cases, had settled the point that such declarations were receivable after the death of the principal, and therefore nothing is said in the judgment.

I am not prepared to go the length of deciding that Whiting's being called as a witness be dispensed with, and therefore I concur with my brother Draper in thinking there should be a new trial.

Per Cur.—Rule absolute for a new trial. (*a*)

(*a*) The following cases may be referred to:—Entries made by a deceased collector of taxes in a public book handed down to him by his predecessor in office, and afterwards delivered to his successor, are evidence against the surety—*Goss* v. *Watlington*, 3 B. & B. 132. So entries in a private book where he charges himself with the receipt of sums of money are evidence against the surety of the receipt of such moneys—*Middleton* v. *Melton*, 10 B. & C. 317. So entries of receipt of rent by a deceased executor under whom a party claims are admissible evidence for him—*Spiers* v. *Morris*, 9 Bing. 687. But accounts of rent signed by one styling himself clerk to a steward, but not shown to have been so otherwise than by the accounts so signed, are not evidence after the decease of both—*Ashburnham* v. *Michael*, 17 Q. B. 276. Entries of charges for building a house in the books of a deceased tradesman, which are there stated to have been paid, are not evidence in favor of the person so charged to show that he built the house—*Doe d. Haden* v. *Burton*, 9 C. & P. 254. Credits for payments entered by rector in his book are evidence for his successor to show on what account payments were made—*Young* v. *Clare Hall*, 17 Q. B. 529. It is no objection to the admissibility of the accounts of a deceased person by which it appears he charged himself that they are not written with his own hand, if written by an agent duly authorized; and this though the agent be alive at the time of the trial—*Doe d. Graham* v. *Hawkins*, 2 Q. B. 212. An entry by a deceased person which only fixes upon him a liability in consequence of a future act by another, is not admissible as an entry by which the party charges himself—*Reg.* v. *Inhabitants of Worth*, 4 A. & E. 132. To make an entry of a deceased person receivable in evidence, it must be an entry against the *pecuniary* interest of the party so charging himself—*Davis* v. *Lloyd*, 1 C. & K. 275; *Cooke* v. *Banks*, 2 C. & P. 478. Where one party reads in evidence entries from the books of the opposite party, the latter is not entitled to read distinct entries unconnected with the entry read—*Catt* v. *Howard*, 3 Stark 8. An entry made by a person in the course of his duty or employment is inadmissible as evidence in his favor—*Doe d. Mather* v. *Whitefoot*, 8 C. & P. 270, 283; *Merrick* v. *Wakeley*, 8 A. & E. 170. When parts of a book are put in the other pvrty cannot use other parts without making them his evidence—*Whitfield* v. *Aland*, 2 C. & K. 1015. In Equity, if one party to a suit cross-examines another party having an adverse interest, he waives the incompetency, and his whole evidence must be read—*Triston* v. *Hardey*, 14 Beav. 21; *Grimshawe* v. *Parks*, 6 U. C. L. J. 64. Charges in a merchant's book not evidence for him as to party to whom credit was given—*Smith* v. *Anderson*, 7 C. B. 21. Indorsement in the handwriting of a deceased clerk made at the time is evidence of the delivery of a bill—*Champney* v. *Peck*, 1 Stark, 401. The payment or act done must be contemporaneous with the entry to render it admissible as evidence in actions between strangers—*Kingslake* v. *Bevis*, 7 C. B. 456. See also *Reg.* v. *Overton*, as to evidence in embezzlement, 18 Jur. 184.

HOLMAN v. WELLER.

Implied liability of stage coach proprietor for loss of letter containing a promissory note—Commencement of suit—Ca. Re. issued before six years, not returned—alias Ca. Re. issued after.

Held per Cur., that the stage coach proprietor (who was also the contractor for carrying the mail) was not liable under the facts of this case (as given below), for the loss of a letter containing a promissory note.

Quære—Is the Statute of Limitations saved by a writ having been issued before the expiration of the six years, though the defendant was not served with such writ, but had been served with an alias writ issued *after* the six years had expired, and though the first writ had not been *returned* until *after* the six years had expired?

(Q. B., M. T., 14 Vic.)

The plaintiff in this case sued the defendant as common carrier, for the loss of a promissory note sent in a parcel by the defendant's stage. The declaration alleged as a special damage, that the note was sent for the purpose of being applied to discharge a debt; that, being lost by the defendant's negligence, it came to the hands of a third party and was recovered against the plaintiff as maker.

The defendant pleaded—1st, not guilty.

2nd, Denying that he received the parcel said to have contained the note.

3rd, That the plaintiff concealed from him the nature and value of the contents of the parcel.

4th, Statute of Limitations.

In regard to the Statute of Limitations the evidence was, that, on the 20th April, 1849, the plaintiff first sued out a writ of *ca. re.* in this cause, returnable in Easter Term then next, which would be on the second Monday in June; the alias writ was issued on the 7th August, 1849, tested on the first day of Trinity Term. The first writ appeared never to have been given to the sheriff. It was filed with the deputy clerk of the crown on the day on which the alias was issued (7th August), but was not then returned by the sheriff, nor until a very short time before the trial, when it appeared the sheriff was procured to make a return upon it of "*non est inventus.*"

The facts were these:—On the 22nd of April, 1843, one Eyre was going to Toronto from Cobourg by a steamer, and the plaintiff handed him two sealed letters requesting him to carry them for him to Toronto, as a favour; one of these was directed to Buchanan & Co., and contained the promissory note in question, being, as appeared by the evidence, a note made by the plaintiff himself and endorsed by one Webster the payee, and another person. Eyre knew nothing of the contents of these letters, one of which was directed to another party,

and having received them from the plaintiff in the room of an inn at Cobourg, he put them under the string which bound up a small parcel of garden seeds that he was taking to Toronto for another person, and laid the parcel on a table. When the steamer arrived at Cobourg, he went down to take his passage to Toronto, and in his haste forgot the parcel, leaving it lying on the table in the inn. On his way he recollected it, and sent back a message to his son by a person who was returning from Port Hope, directing him to wrap the parcel of seeds and the letters in brown paper and to forward the parcel so made up by the stage, addressed to him (Eyre) at Toronto. This was done as directed; and the parcel was merely tied with a piece of string, not sealed, and with nothing upon it to denote that it contained anything of great value, or any letters. It was given to a person in the stage office who usually booked passengers and parcels for the stage. It appears that the stage was set fast in a mud hole on the way up, the roads at that season being bad, and during the delay occasioned by this accident a person took the opportunity of stealing this parcel; he was suspected of it, and when arrested and charged with it, some time afterwards, he confessed the theft. Verdict for plaintiff, 36*l.* 6*s.* 5*d.*

Weller obtained a rule for a nonsuit on leave reserved.

Vankoughnet shewed cause.

Cases cited:—Aleyn 93; 1 Vent. 238; 4 Burr. 2298; 4 B. & Al. 21; 4 Price 31; 3 B. & B. 177; 5 B. & L. 56, 342; 1 M. & M. 154; 8 M. & W. 443; 10 M. & W. 161; 2 Q. B. R. 646; Holt's N. P. 317; 2 Stark 82; 2 C. & K. 681; 6 U. C. R. 411; 1 M. & R. 39; 4 B. & Al. 452; 4 B. & C. 625; 8 B. & C. 489; 3 Saund. 1, note (1).

ROBINSON, C. J.—It seems to have been held in some cases, that, to save the Statute of Limitations, the first process must not only be sued out within the six years, but must be returned in time, it is relied upon as the commencement of this action, where the defendant has not been served with the first writ, but with a subsequent writ taken out in the same cause, though not until after the six years had run out. The alias writ here does not bear teste on the day of the return of the first, and the first was not in fact returned by the sheriff till long after the alias had issued. The case of *Breadmore* v. *Rattenbury*, 5 B. & Al. 452, however, is an authority for holding that the objection on the ground of discontinuance would not be fatal, but that the continuances necessary for connecting the two writs could be entered at any time.

To support the verdict in this case, nevertheless, it will be necessary to hold that the plaintiff, if he sued out a writ within six years, might keep it in his desk until long after the return, and then might sue out

another writ after the six years were out; and that he would be held not barred by reason of his first writ being within six years, although he had never got it returned nor even given it to the sheriff till after he sued out the alias.

Though there is some inconsistency in the cases, none of them, I think, go the length of holding that the statute may be so avoided, though it may be that this distinction would would now be held by the courts—namely, that if the plaintiff is not out of court as regards the suit instituted by suing out the first writ, but is in a situation to declare upon that writ, then he can avail himself of it for the purpose of avoiding the Statute of Limitations, for that he can enter his continuances at any time, and that his alias writ being irregularly sued out before the first was returned does not absolutely destroy the connection of the process. I cannot say that I have brought myself satisfactorily to that view of the case. It seems to me inconsistent with what may be gathered from the cases reported in 5 B. & Al. 488; 6 T. R. 617; 14 E. R. 492; 7 T. R. 6; 2 B. & P. 158. On this point of the Statute of Limitations I have still some doubt.

We all concur in the opinion that the verdict should not have been allowed to stand on the merits of the case. The plaintiff seems to have been long in making up his mind to risk an action, for he allowed six years to elapse, within two days, before he ventured upon it, which in reason he should not have done if he felt that he had a legal claim and ever meant to urge it; because, after such a lapse of time, it might be difficult for a proprietor of stage coaches to prove what the facts really were in regard to a particular parcel said to have been lost. The question of liability might depend on various circumstances liable to be forgotten and not capable of being established at a great distance of time. The drivers of stages are frequently changed, and it is not always possible to trace them after so many years. I do not wonder at the plaintiff's delay, for it does appear to me that it must have been difficult for him to persuade himself that he had, under the circumstances, any right to hold the defendant responsible for the safety of a letter sent as the one in question was sent. The learned judge, on the trial, did not consider that the defendant was liable, and I am satisfied that on several grounds he was not.

There are several objections to the plaintiff's right to recover. If, as it appears, the note was a note made by himself, the plaintiff at least was not a loser of the security. The only loss he could sustain would be the disappointment in not being able to make the remittance. It was not shewn that either of the endorsers was his debtor, and bound by under-

standing with him to pay the note when due, rather than leave it to the plaintiff to pay as maker in the ordinary course. Then there was no contract express or implied, between the defendant, the stage proprietor, and the plaintiff, to carry these letters. All that can be said is, that the defendant's stage driver received a parcel to carry for another person (Mr. Eyre), and consigned to him (Mr. Eyre), in which parcel, unknown to the defendant or his servant, there were two letters for other parties, between whom, or between the person who gave them to Mr. Eyre and the defendant, there was no contract whatever, express or implied. The defendant or his servant had no knowledge that he was carrying or expected to carry a sealed letter containing promissory notes for any one, and he had no means of knowing it, for it was proved that neither Mr. Eyre nor his son, who dispatched the parcel, had any intimation of what the letters contained. It is said, in some cases, that if the carrier desires to know the contents of any parcel in order that he may make a corresponding charge, and may take more particular care, it is his business to enquire. (*a*) It is shewn plainly that such an enquiry in this case must have been fruitless, for the plaintiff himself neither employed the defendant nor desired him to be employed in any business of a common carrier for him, and he had no connection with or control of the parcel of garden seeds in respect to which alone any charge could be expected or intended to be made.

Again, the defendant was himself the contractor for carrying the mail; acting in this capacity he would not have been liable as a common carrier to the plaintiff, if the letters had been put into the post office as they should have been in the very mail bags which he was carrying on the same occasion, and if the mail had been robbed. That has been decided in several cases.

If Mr. Eyre's son had given the letters to the stage agent at Cobourg, instead of wrapping them up with the garden seeds, we must assume that they would have been put into the mail bag either at Cobourg, by the driver, or in the first way bag made up on the road; for, to say nothing of the prohibitions in the post office laws against sending letters by private hands, the defendant surely would be acting in violation of his public duty as mail contractor, if, being paid for carrying the mail, he had also carried letters for hire on his own private account, which would be a fraud on the post office.

(*a*) But refusing to disclose contents of parcel, is no ground for carrier refusing to carry, unless his motive is a good one—*Crouch* v. *London and N. W. Railway*, 14 C. B. 255.

It is impossible to admit that, under such circumstances as was proved here, any implied contract arose between the defendant and the plaintiff to carry those letters for the plaintiff, for a reward to be paid to the defendant. The plaintiff never expected or intended directly or indirectly to pay anything; and neither the defendant nor his servant was conscious that they were doing anything for the plaintiff which could give a claim for a reward. (*a*) If there was any implied contract, it was with the owner of the parcel, in respect to which alone we must suppose any charge could be made, and not in respect of the letters.

To sustain this action, the defendant must be held to be liable as a common carrier not of goods merely but of *letters*, and liable without shewing that any letters had been given to him to carry, and without any legal right to charge for carriage of letters or any usage shewn to receive a reward for doing it, whereas the very strict liability of common carriers of goods arises by reason of the reward which they are entitled to receive. (*b*)

DRAPER, J.—As to the Statute of Limitations, the first writ is clearly sued out within the six years. It is returned, and the declaration is filed within a year from its issue. An alias does in fact issue, to which defendant appears, after the return day of the first writ and before the plaintiff has declared.

This distinguishes the case from *Harris* v. *Woolford*, 6 T. R. 617. There the cause of action accrued on the 23rd July, 1791 (debt, on 27 Geo. III., ch. 1, Lotteries Act), and the memorandum of the declaration was of Hilary Term, 1795. To shew the action begun in due time two writs were produced, the first a *latitat*, tested 13th July, 31 Geo. III. (1791), endorsed 27th July, 1791; the second, an alias tested 28th November, 32 Geo. III., endorsed 13th January, 1792. The first writ had not been returned at the time of the trial, and the court nonsuited the plaintiff, because there had been no return of the writ. But the lapse of time between the day of entitling the declaration and the return of the process rendered it necessary to connect the

(*a*) If a parcel be given to a waggoner for him to carry for his own gain, and not for the profit of his master, the master is not liable in case the parcel is lost.

(*b*) An instrument bearing a bill of exchange stamp, and reading "three months after date pay to me the sum of," &c., and accepted, was sent by railway to a creditor of acceptor for him to sign as drawer, and was lost. *Held* to be a "writing," and not a bill, note, or security for money, within the meaning of the Carrier's Act, but that it could not be considered of value so as to exempt them from liability on the ground of want of notice—*Stoessiger* v. *South Eastern Railway Co.*, 18 Jur. 605.

the two together by continuances, and also to connect the second writ with the first.

The case of *Parsons* v. *King*, 7 T. R. 6, seems nearly like the present. It was an action under an inclosure act, and had to be brought within three calendar months, which appeared at the trial to begin to run on the 19th September, 1795. The declaration was of Trinity, 1796; and to shew the action commenced in time, the plaintiff proved a writ sued on the 16th December, 1795, but without shewing it had been served or returned. *Harris q. t.* v. *Woodford* was cited to prove that the plaintiff should be nonsuited. The court distinguished the two cases. In the former, two writs (they say) were proved, and it was necessary to save the time to shew *that the second, on which the plaintiff declared,* was a continuation of the first, which could only be done by shewing that the first was returned, in order to warrant the issuing of the second. "But here the plaintiff gave in evidence a writ sued out in proper time, which will warrant his declaration, and *therefore there is no necessity to shew the writ returned.*" If the plaintiff do not declare within two terms defendant may sign judgment of *non pros.*, yet if he omit to do so, the plaintiff may declare at any time within a year after suing out his writ. (*a*)

The court evidently treat the declaration as clearly founded upon and connected with the writ, which had issued within a year of the date of the declaration. But then no second writ appeared. In our case, I think the court must assume that the declaration is founded on the alias writ; and the question is, whether the alias is connected by the evidence with the first, there being no continuance roll.

In *Beardmore* v. *Rattenbury*, 5 B. & Al. 452, it appeared a *test ca. re.* issued a short time before the expiration of the six years, returnable in Michaelmas, 1820, and *then* returned *non est inventus;* and secondly an *al. test. ca. re.* subsequently to the six years, returnable in Easter, 1821. No writ or entry of a writ returnable in Hilary Term was produced in evidence. The court held that the continuances might be returned at any time, and that the supposed discontinuance was not a ground of nonsuit.

Willes 255—This case shews that there must be a return to the first writ shewn, where it is replied in pleading to the Statute of Limitations;

(*a*) By the Common Law Procedure Act a plaintiff is deemed out of court unless he declare within one year after the writ of summons is returnable. It has been held, in *Swift* v. *Williams*, 5 U. C. L. J. 252, that the writ is returnable within the meaning of the Act from the day of service, and that the year runs from that date. See also *Morton* v. *Gray*, 9 B. & C. 544, *Eadon* v. *Roberts*, 9 Ex. 227, and *Watkins* v. *Fenton*, 8 U. C. C. P. 289.

otherwise plaintiff might sue out a writ and keep it in his pocket for six years together—of which defendant could not possibly have any notice—and then enter it, (*without shewing any return to it,*) and continue it down to avoid the Statute of Limitations.

In *Stanway* v. *Parry*, 2 B. & P. 157—a penal action—*ca. re.* issued within a year after the offence committed. This writ never was returned, nor was defendant served with it. During the same term, but after the expiration of the year, a *capias* per continuance issued, and was duly served and returned. The declaration was entitled of the same term. The court held, that the first writ not having been returned could not be connected with the second so as to support the action. (Note, a *capias* per continuance, is in effect an alias *capias*, the practice in the Common pleas having been to express the difference in the precipe in which it is a *capias* per continuance, the writ not containing the words "as before we have commanded.")

In *Taylor* v. *Hipkins*, 5 B. & Al. 489 (see 1 Bing. 325); it was held sufficient that the sheriff's return of *non est inventus* to a special *capias*, an alias and a pluries *capias* were made before the end of the term in which the pluries was returnable, having been all left in the secondaries' office in order to their being returned, and having been delivered out of that office more than eight years afterwards, and two days after the suit was begun, in which the question arose whether those proceedings saved the Statute of Limitations, a roll of the proceedings, with continuance on the writ of pluries, having been docketted about four months after the last mentioned suit was begun.

Harrington v. *Taylor*, 15 East. 378, is on the form of pleading. There the first writ was pleaded to have been returned *non est.*

Plummer v. *Woodburne*, 4 B. & C. 625; and *Page* v. *Newman*, 8 B. & C. 489; do not directly affect the case. As far as they apply they support the plaintiff's case: but they arise on *pleading.*

I am very doubtful as to the Statute of Limitations. My present impression is with the plaintiff on this point, but it is unnecessary to decide it, for on the main point I entertain no doubt, but concur entirely in the judgment just pronounced. (*a*)

BURNS, J., concurred.

Per Cur.—Rule absolute for nonsuit.

(*a*) The writ must be filed to save the bar of the statute—*Hunter* v. *Caldwell*, 10 Q. B. 69. See *Carne* v. *Malins*, 6 Ex. 803; *Cornish* v. *Hocking*, 1 El. & B. 602, s. c. 17 Jur. 1049; *Anon*, 28 Eng. L. & Eq. R. 224, and *Gapp* v. *Robinson*, 12 C. B. 828, s. c. 16 Jur. 977.

In re Smith and Municipal Council of Euphemia.

Alteration of Roads—By-Law of Municipal Council—12 *Vic. ch.* 81, *sec.* 81, 189.

A municipal council in passing a by-law for the alteration of an old road, described the point of commencement of the new road as being "*about eight chains* south of N. W. corner, &c." The court held that in the absence of any ground for exceeding or coming short of the *eight chains*, the road was to commence at a point *eight chains* south, &c., and that the objection of the uncertainty of the point of departure of the road was not an objection sufficiently strong to warrant them in setting aside the by-law; but *held*, that the by-law was bad for not assigning *any width* to the new road, and it was therefore set aside but without costs.

(Q. B., M. T., 14 Vic.)

Mr. Cameron, Q. C. obtained a rule returnable on the 1st of Michaelmas term to shew cause why a by-law passed by the municipal council of the township of Euphemia on the 16th of July 1850, authorizing an alteration of a certain road formerly surveyed on the north and south sides of the river Sydenham, as in the said by-law mentioned, should not be quashed with costs.

The rule had been served upon the town reeve and was answered by affidavits filed.

The by-law was transmitted under the seal of the council, certified by the township clerk. It recited that it was necessary to open and establish a new road on the north and south sides of the river Sydenham, and enacted that, "The following road, being an alteration of a certain road formerly surveyed on the north and south sides of the river Sydenham, be granted, confirmed and established as a public highway, for the public good of the township of Euphemia, said line commencing *about eight chains south* of the N. W. corner stake of lot No. 29, in the fourth concession, thence, S. E. 22 chains 18 links, thence &c., giving the various courses and distances precisely.

The objections were—1st: the uncertainty of the point of commencement—about eight chains south, &c., (as above). 2nd: the complainant *Samuel Smith* made affidavit that the said line of road as described in the within by-law, passed over and included a considerable part of his property, and that the said line of road as laid out by the said by-law, ran through encroached upon the orchard and pleasure ground of him the deponent, and that such line was so laid out without his consent, given either before or after the said line of road was laid out. The by-law assigned no particular width to the road, nor did the statute contain any general provision which would give it at a certain width.—See 189th clause.

Robinson, J. C., delivered the judgment of the court.

The complaint that the road passed through an orchard or a pleasure

ground seems to be repelled by affidavits filed in answer to the rule, and we feel ourselves under no necessity of interfering on that ground.

Then, as to the uncertainty of the point of departure, we think we may hold in the absence of any ground for exceeding or coming short of the eight chains, that the road is to begin at a point eight chains south of the post referred to.

But we consider the by-law bad in not assigning any width to the road, and not even saying that the line described is to be the centre of the road or the outer limit of it on one side or the other.

The statute provides that the road when altered in its direction *may* be made of the same width as the old road, not that it *must* be, and as to any new road, it is to be laid out not more than 90 feet nor less than 40. In any case there is a discretion to be exercised by the council, and the by-law should show that it has been exercised, or how is the proprietor of the land to know in many cases whether the authority of the council has been exceeded or not, or how much land he is entitled to claim compensation for?

No width being stated in this by-law, and in fact no road laid out or sanctioned—nothing but an unauthorised line—we feel it necessary to set aside this by-law, but not with costs. (*a*)

Per Cur.—By-law set aside without costs.

ROACH V. MUNICIPAL COUNCIL OF HAMILTON.

As to debt lying against the Township Council for expense of a survey made under the 38 Geo. III., chapter 1.

Held per Cur.—**That the Township Council of Hamilton coming in the place under the 12 Vic. ch. 81, sec. 81, heads 26 and 31, of the trustees of the Newcastle district in quarter sessions assembled could not be held liable in *debt* to the surveyor who had been appointed under the 38 Geo. III., chapter 1, to re-survey the township of Hamilton.**

(Q. B., M. T., 14 Vic.)

Debt for work and labor by the plaintiff as a land surveyor in surveying the Township of Hamilton, making plans and field notes, &c., pursuant to stat. 38 Geo. III. ch. 1—a count on an account stated.

Pleas—*nil debet*—payment.

The plaintiff moved that on the 9th of July, 1846, the justices of the district of Newcastle in quarter sessions made an order upon the application of thirty freeholders, under statute 38 Geo. III., ch. 1, for the

(*a*) By section 320 of the Consolidated Municipal Act, p. 614, it is provided that no Council shall lay out any road or lane more than ninety nor less than thirty feet in width; but any road when altered may be the same as formerly.

survey of the township of Hamilton, and setting up permanent monuments to mark the several boundaries and concession lines: that a warrant was afterwards made by two justices of the peace, to the collector of rates, to levy 300*l.* on an assessment of 1¼*d.* in the pound for defraying the estimated expense of the survey—that in January and July 1847, orders were made by the justices of the district of Newcastle in quarter sessions, upon *the treasurer of the district*, to pay to this plaintiff 75*l.* and 225*l.* out of monies in his hands appropriated to paying the expense of this survey.

The approved estimate was shown, and the field notes and plans, and the instructions of the government issued in May, 1806, for the survey referred to.

Then it was shewn that on the 22nd of November 1849 the collector reported that he had collected 50*l.*, which was paid over to this plaintiff by the treasurer's order: also, that the distress warrants had issued against the collector of rates, White, and his sureties, directing the levy on them of the balance of 250*l.*

On these facts the learned judge was clearly of opinion that no action of debt in the form of the declaration in this case would lie against the Township Council of Hamilton, and directed the plaintiff to be non-suited.

ROBINSON, C. J., delivered the judgment of the court.

I am of opinion that the non-suit was proper. The justices of the peace in 1846, acting under the stat. 38 Geo. III., ch. 1, made an order for the resurvey of the township of Hamilton—estimated the expense at 300*l.*, and directed the money to be raised by their warrant, by a rate imposed by their order, on the inhabitants of the township. I infer from the evidence, that the collector did actually levy the whole amount and misapplied the greater part of it. The first question would be, if all remained as it then was, in the authority of the justices, could they, without special legislative authority, have imposed a second rate to raise the money again? I apprehend not. They had no other money applicable in their discretion to its payment. They owed no debt to the surveyor—they had only to discharge a public duty prescribed by the statute, which they had done. If they could have made a second rate and yet declined to do so, the remedy would have been by application for a mandamus to compel them.

Then comes the late act, 12 Vic., ch. 81, by which (see 31, 26 and 31st heads,) the statute 28 Geo. III., ch. 1, is superseded, as regards the intervention of the justices of the peace; either for the purpose of establishing the boundaries, or of paying the expense of it—but the

change is prospective only. In this case the work had been done under the authority of the justices properly exercised, and ought no doubt to be paid for. But does it follow, that in consequence of what has been done, there is a debt legally due by the newly constituted township council to the plaintiff; such as the plaintiff sues for as arising from services rendered by him for them? I think clearly not. If a debt arises at all, it could only be under some special provision of the late statute rendering the township council liable for debts due by the quarter sessions, and the circumstances of the debt should have been set out truly and the transfer of the obligation relied on, instead of treating the debt as originally contracted with the township council.

But can we hold that there is a debt due by the township council in respect of this transaction, which can be declared for in any form? The 182nd clause of the 12 Vic., ch. 81, clearly does not apply to this case, because this is not the case of a debt due by any of the municipal bodies mentioned in that clause before the 1st January, 1849, or at any time.

Neither can the 175th clause be applied to this case; and I can find no provision which could authorize us in holding that in a case where there was no legal debt that could be enforced, either against the justices or against the district council in respect of a past transaction, the township council can be made liable to an action of debt as coming in their place.

If there is any remedy it can only be by applying to them to pass a by-law to raise the money if it has not been collected under the warrant issued formerly against the collector's sureties; and if they decline to pass such a by-law, the plaintiff must then take advice as to the course that can be adopted for compelling them.

The 43d section of 4th and 5th Vic., ch. 10, applies only to cases in which debts were due by the justices by reason of matters done by them in the prosecution of objects over which they were no longer to have any control; which is not this case, for the district council were never, as to a matter of this kind, substituted for the justices, and indeed this proceeding took place long after the district councils were established.

It does not seem to have been shewn at the trial whether the money was or was not levied upon the collector's sureties, or why it could not be so levied; but, however this may be, we think the non-suit was proper, for the reasons given.

Per Cur.—Rule discharged. (*a*)

(*a*) Cases arising on the responsibility of District Councils for contracts entered into by the Justice in Quarter Sessions before the establishment of District Councils, will be found *ante* pp. 1, 8, 86, 136, &c.

In re Lafferty v. Municipal Council of Wentworth and Halton.

Municipal Corporation Act, 12 Vic., ch. 81, clauses 155, 192—power of court to quash by-laws—notices—orchards.

Under the 155th and 192d clauses of the Municipal Corporation Act, 12 Vic., ch. 81, this court has the power of quashing a by-law, not only for some illegality appearing upon the face of it, but also where as a matter of fact the by-law has been made in such a manner as it is enacted by the 192d clause it shall not be lawful for any municipal corporations to make it.

In this case, under the facts mentioned in the affidavits, as stated below, the court refused to quash a by-law for changing a road, on the grounds—1st that notices had not been put up as the act requires; and 2dly, that the applicant had not given his consent to the road passing through his orchard.

Corporations should be careful to preserve proof of regular notices, by affidavit of persons employed to put them up.

(Q. B., M. T., 14 Vic.)

In Hilary term last, *Mr. Read* obtained a *rule nisi*, that the Municipal Council of Wentworth and Halton should shew cause why a certain by-law made by them should not be quashed, on the ground that it was illegal and contrary to the 11th head of the 41st section of 12 Vic., ch. 81, and because the highway established by it would pass through the enclosure of the applicant James Lafferty, without his consent in writing being obtained; and because one month's notice was not given in manner directed by 12 Vic., ch. 81, sec. 192; and because the said by-law was otherwise contrary to the said act, and on other grounds in affidavits filed; the costs of this application to be in the discretion of the court.

The by-law recited that it was expedient to alter the line of road down the mountain at the north-east angle of lot No. 26, 2d Con. east Flamboro'; and proceeded to direct that a certain line of road be established according to the survey and report of Thomas A. Blyth, Esq., D. P. S., as a public highway, and to be fifty feet wide, and describing the centre line of the said proposed highway by courses and distances.

It then provided that the petitioners should provide Mr. Lafferty free access to a spring by an opening under the bridge to be made across a ravine, and that the petitioners should pay all the expenses incurred in establishing the road, and that none of the county funds should be applied to pay for the land taken for the road.

Lafferty, the present applicant, made oath that the greater part of the land over which this new road would pass was owned by him in fee; that seeing a notice about the 31st December last, on the close of the school-house on the defendant's farm, signed by Blyth the surveryor, that application would be made for this proposed line of road to be laid out, he petitioned on the 30th of January against it, objecting that the

road would pass through his orchard, as he swore it did, and otherwise injure him; that a better road up the mountain and less injurious to him might be had through his land; that he had heard of no other notice than the one he saw; that as far as he knew, the municipal council did not give one calendar month's notice of their intention to open or alter the road; that on the 30th of January he appeared before them and stated that the road would run through his orchard and obstruct him in the use of a spring on his farm; that he planted his orchard the year before, and it contained about forty trees, some of which had borne fruit.

An affidavit was filed of Hugh MacMahon, a surveyor, with a plan shewing that the new line ran through Lafferty's orchard, and shewing where a better road might have been laid down.

Thomas Foster swore that the orchard was planted in the end of November, 1849, and as he believed, solely to prevent the road being made—that he put up three copies of the notice produced in public places described.

A petition was shewn, signed by twenty-four inhabitant freeholders.

A number of affidavits were filed by persons who applied for the road, stating that in the summer of 1848 they spoke with Lafferty about this road, offered him any compensation that would be awarded for the line required, and asked him to point out any line that he thought would be better—that he objected to their doing anything, and expressed his determination that no such road should be made, and that they believe he planted his orchard solely to prevent the proposed road from being laid down.

Lafferty denied this. He did not positively say that the notices required were not put up, but that he had tried to ascertain and could not find that they were.

The corporation on the other hand, did not furnish proof of six notices being put up, as directed by 12 Vic., ch. 81, sec. 192.

No proof to the contrary however was furnished, except on the affidavit of Lafferty before mentioned.

The clause provided, that it should not be lawful to make any by-law for stopping up, altering, &c., any public highway until they have caused at least one calendar month's notice to have been given by written or printed notices put up in the six most public places in the immediate neighborhood of such highway—*nor until they shall have heard* in person, or by council or attorney, any person through whose land such proposed highway shall run, *and who may claim to be so heard before them.*

The council were authorised to make by-laws for opening, stopping up, widening, altering, changing or diverting any public highway in the county, provided that no such new or altered highway should be laid out so as to run through or encroach upon any dwelling house, barn, &c., or through any orchard, garden, yard or pleasure ground, without the consent in writing of the owner thereof.

The 155th clause enacted that any resident inhabitant of any county, &c., in which any by-law should be passed, or any person having an interest in the provisions of such by-law, might apply for and obtain a copy of it, and that this court might be moved to quash such by-law; and that if it should appear to this court that such by-law was *in the whole* or in part illegal, it should be lawful, upon proof of service of a rule on the corporation to shew cause, &c., for this court to order such by-law to be quashed in the whole or in part, and to award costs for or against the corporation.

Brough shewed cause. The several clauses of the act above referred to were mentioned in the argument.

ROBINSON, C. J., delivered the judgment of the court.

As to alleged want of notice: Taking the 155th clause by itself, I should be inclined to think that the legislature intended this court should only quash a by-law for some illegality appearing on the face of it—but taking it in connection with the 192d clause, I consider that we must pronounce any by-law to be *illegal*, and quash it as such, which has been made in such a manner as it is enacted by that clause it shall not be lawful for any municipal corporation to make a by-law, and this applies to the fact of notice. (*a*)

So also as to the other objection, founded on the eleventh head of the 41st clause, that this road has been laid out through an orchard. That is an objection which would not appear on the face of the by-law itself, but I consider that upon its being proved to us *aliunde* that a by-law has been passed in disregard of this provision, we have authority to quash it as illegal, being made in express opposition to the statute which confers the power of making by-laws.

But as to notice—all that is shewn is, that the applicant believes the required notices were not put up—he has not, he says, been able to ascertain that they were. He gives no other proof of this ground of illegality. The corporation, on the other hand, does not shew us that

(*a*) This ruling has been sustained in cases of by-laws which have not been passed with the formalities required by the Municipal and School Acts.

six notices were put up as the 192d clause directs, though there is an affidavit of a person that he put up three of such notices.

It would be well that the corporation should in every case preserve proof of regular notices by affidavit of the persons employed to put them up. (a) But there is no limit as to the time when any by-law may be objected to, and would be unreasonable that we should assume notices not to have been given, and pronounce a by-law to be illegal, and by quashing it, leave parties exposed to actions for what has been done under it, because the corporation has not established to our satisfaction the fact of notice, though the want of regular notices has not been positively alleged. And here the only complaint of want of notice, and that doubtfully alleged, is from a person who actually had knowledge of the proceeding, and attended and was heard before the council in opposition to it.

Upon the second objection—it appears that the orchard was planted eighteen months after Mr. Lafferty knew that it was desired to lay out the road in question as one which would be convenient to the public, and after the precise line as now established had been selected and surveyed. It seems but too probable that the trees were planted there merely to obstruct the change of the road, and that would not in my opinion bring the case fairly under the prohibition contained in the 41st clause—otherwise, it would be in the power of any person apprehending that a road was intended to be laid out through his premises, to prevent the council effecting a most essential public improvement by puting up a miserable out-house where it was not required, or planting a few trees where he had never thought of planting them before, and where he never would have planted them except for the purpose of obstructing the improvement.

As to costs. If the corporation had laid before us clear proof of the publication of the notices required by law, which they ought to have been prepared to do, I should have been inclined to make the applicant pay the costs, but as they have left us without that proof of what they ought to have been in a condition to furnish, we shall merely discharge the rule.

Per Cur.—Rule discharged without costs.

(a) Or an entry made in the proceedings of the Council at the time to the effect that the required notice had been put up, might be sufficient; for it has been held that extracts from parish registers, signed by the incumbent or rector, &c., are receivable in evidence—*In re. Hall's Estate*, 2 De G. M. & G. 748, s. c. 17 Jur. 29. So assessments made by Commissioners of Land Tax—*Doe d. Strode* v. *Seaton*, 2 A. & E. 171. Also, certain entries in books of clerk of the peace—*Hunt* v. *Andrews*, 3 B. & Al. 341. See also the cases cited in note (a), *ante* p. 390.

PERRY v. POWELL.

Surveyor General's return of a lot as described for grant—Evidence to rebut this return—Effect of erroneous return where land sold for taxes.

When the Surveyor General returns a lot of land as described for grant, proof that the land was not in fact so described must be of a very positive and affirmative kind. The mere evidence of a clerk in the Surveyor General's office that he finds no trace of it will not do.

Quære.—The effect of the Surveyor General having in any case *erroneously* returned a lot of land as having been described for grant, when in fact it had never been so described, and when in consequence of this error the land has been charged with assessments, and being returned in arrear, has been sold.

(Q. B., M. T., 14 Vic.)

Action on covenant for title.

Plea—that the defendant was lawfully seized, &c.

The plaintiff proved that he had purchased the lot from one A. B., who bought from the defendant in February, 1831, paying him 47*l.* 5*s.*, which sum he claimed, with interest, on account of the defendant's alleged want of title.

The defendant gave in evidence the Surveyor General's return made in *June*, 1820, containing this entry:—

6 } Township of Clarke, 9th Concession—Josette Merritt and Joseph
7 } Merritt—D. 400 acres.

And the treasurer who produced this return swore that nine years' taxes being in arrear on these and other lands, he made the return to the Quarter Sessions required by law.

The sheriff of the district of Newcastle proved that on the 16th of February, 1830, he sold 189 acres of lot 6, 9th concession, to Powell (defendant), on a warrant directed to him to sell for taxes; and that he made a deed to Powell of the land on the 25th of February, 1831.

It was proved that the lot No. 6 was located to Joseph Merrit under an order in council of the 17th of November, 1797, under which it was allowed to Joseph Merritt as son and heir of the original nominee in 1841.

A clerk in the Crown Lands' office proved that he had searched in the office and could find no trace of a description having ever issued, or of the lot having ever been described before the allowance by the Heir and Devisee Commission in 1841.

Upon this evidence it was contended for the defendant that his title under the sale for taxes could not be impeached; for that the return of the Surveyor General must be taken as conclusive evidence of the fact of the land having been described as marked by him.

2nd. That the covenant in this case did run with the land, and could not be sued upon by the plaintiff.

The learned judge was of opinion that the plaintiff could maintain the action, and that the defendant had failed in shewing a title, and left the amount of damages to the jury.

The jury, however, found a verdict for the defendant, declaring that they considered that the deed made by the sheriff must prevail.

The plaintiff, by *S. Smith*, obtained a rule for a new trial on the law and evidence, and because the verdict was given against the direction of the learned judge. *D. E. Boulton* shewed cause.

ROBINSON, C. J.—delivered the judgment of the court.

I am not aware that it has yet been determined what shall be the effect of the Surveyor General having in any case erroneously returned a lot of land as having been described for grant, when in fact it had never been so described, and when in consequence of this error the land has been charged with assessments, and being in arrear has been sold.

When the first return was made after the passing of the statute of 1819, the Surveyor General, misapprehending the statute, included in his return not only those lots which had been described for grant—which was all that the ligislature had directed should be returned—but also those lots which had been merely located and never described. This led the treasurer into an error, and in some instances lands were sold after eight years' taxes had been charged against them, though they had never been described for grant, which was plainly contrary to the intention and provision of the statute.

The reason for making the distinction was obvious—and at any rate the legislature did make it; and in several of such cases it was held that there was no authority for what had been done—the very foundation of the proceeding being wanting—and such sales were adjudged to be illegal. In *Doe dem. Bell* v. *Newman*, and *Doe dem. Bell* v. *Orr*, and in other cases, I think this point was discussed.

But the present is a different case. Here the Surveyor General has returned the lot in question as described for grant—that is, he has marked it with the letter D in his return—which it seems to be conceded rather than proved must be taken to mean described; and the plaintiff brought his action on the ground of failure of title derived through the sheriff's sale for taxes, because, as he endeavored to shew the jury, the land had never in fact been described, although certified officially to have been described: wherefore he contended the sale must be pronounced void.

That is a question requiring to be very gravely considered; but we do not at present enter into it, because it does not appear to us that the

jury had such evidence before them as would have warranted them in discrediting the Surveyor General's return.

The Surveyor General made his return in 1820; and it was shewn that no patent was completed for the land till 1841, when it was allowed by the Commission to the heir of the person to whom it had been located in 1797. That only proved that no patent had been completed earlier; but if it had been described for grant any time before 1820, and the original nominee or his heir had merely delayed suing out the patent, as they might have done at any time after obtaining the description, that would not prevent the land from being charged with taxes in the meantime.

That a clerk was brought into court in 1850, thirty years after the Surveyor General made his return, and swore that he had searched the office and found no trace of a description till after 1841, was not conclusive against the fact of its having been before described; he ought at least to have been able to speak positively, from the search he had made, that it had not been so described. The Surveyor General's return is a solemn official act, entitled to credence, and if evidence can be brought to contradict it, it ought to be such evidence as makes the fact clear.

It might happen that after a lapse of 30 years a clerk might fail in finding evidence of a fact in a public office, which nevertheless may have existed; and whatever may be the effect of its being certainly proved in any case that the land had not been described, the proof should at least be of a positive affimative kind, not the mere negative evidence of a clerk saying he finds no trace of it; he may not have known all the sources of information that exist in the office, or may not have so exhausted them all as to enable him to say that the Surveyor General had certified what was incorrect; and at least, if he did feel that he could take upon himself to pronounce a decided conviction on that point, he should have been asked to do so.

It was intimated on the argument that some understanding has been come to between the parties, which renders our decision upon this rule only necessary as respects the costs. Upon the evidence we decline setting aside the verdict and discharge the rule.

Per Cur.—Rule discharged.

THE QUEEN v. TAYLOR.

12 *Vic., ch.* 81, *secs.* 72, 185—*quashing conviction by mayor under act.*

Held per Cur.—That the defendant, appearing on the evidence returned *bona fide* to have asserted a claim to the land which he had enclosed, it was not a proper case for the adjudication of the mayor (of Belleville) under the 72d or 185th clause of the statute 12 Vic., ch. 82; and that, consequently, the mayor's summary conviction of the defendant under that act might be quashed by certiorari.

(Q. B., M. T., 14 Vic.)

Certiorari.—On the 1st day of June, 1850, B. F. Davy, Esq., mayor of the town of Belleville, convicted George Taylor, the defendant, of the offence of obstructing Rear street in the town of Belleville, by putting a fence across the same, contrary to the form of a by-law made by the town council, and fined him 10*s.* for such obstruction.

The conviction having been removed into this court by certiorari, a *rule nisi* was obtained by *Wallbridge* for the defendant, to shew cause why it should not be quashed on the ground that the title to the land through and over which the street ran which was charged to have obstructed was claimed by the defendant, and that the existence of any legal highway there was denied; wherefore the case was not one in which a summary conviction could properly take place, as the evidence shewed.

The by-law which the defendant was charged with having violated was made under the authority of the statute 12 Vic., ch. 81, sec. 60, (2d head,) and sec. 80, by which the municipal council of the town of Belleville has power to make laws "for preventing the incumbering, injuring or fouling of any highway, road or street, &c., within the town, by any animals, wheel-barrows, cabs, carts, carriages or other vehicles, lumber, stone, building or other materials or things whatsoever, or in any other manner whatsoever."

The defendant contended that the evidence before the mayor shewed plainly that he was not acting in a mischievous, wanton spirit, but *bona fide* in the assertion of a claim to the land which he enclosed. The complaint charged him with obstructing a street in the town of Belleville. The statute 12 Vic., ch. 35, sec. 33, declared that in every town which had been surveyed under the authority of the government, all allowances for roads or streets which had been laid down in the original survey of such town should be public highways, and that all posts or monuments planted in the original survey to designate or define any allowance for a road or street should be the true and unalterable boundaries of such road or street.

The complainant contended that, as he had shewed the defendant to

have placed a fence over part of an allowance which Mr. Wilmot, a surveyor, marked out as a street in the original survey and laying out of the town plot of Belleville by him, under the authority of the government in 1847, he had been thereby guilty of obstructing what the statute has expressly confirmed as a street, and must therefore be held guilty of the offence prohibited by the by-law.

On the other hand, the defendant contended that, as Mr. Wilmot was sent and instructed to lay out a town on lot No. 4, in the front of Thurlow, which lot alone was then the property of the Crown, he could have no right under those instructions to lay out any part of lot No. 5, as a portion of the town plot; that if he did so, it could not be said to be a survey made under the authority of the government, but was a survey made without and against their authority, which could never have the legal effect of depriving the owner of lot No. 5 of the portion of his land taken improperly into the town plot, whether by error or otherwise.

Benson shewed cause against the rule, and cited the following authorities.—12 Vic., ch. 81, sec. 31, 29th head; sec. 41, 20th head; sec. 50; sec. 60, 23d head; sec. 72; sec. 81, 9th head; sec. 185; 4 P. & D. 679; 1 Q. B. R. 66; 1 B. & B. 439.

Walbridge, in support of his rule cited 1 Mod. 34; 1 Ld. Ray. 469, 583; 4 B. & Al. 521; Cowper 578; 2 Ld. Ray. 900; 1 Salk. 181; 3 Salk. 217; Doug. 499; 8 Q. B. 926; 12 Vic., ch. 81, sec. 60, 2d clause, and sec. 80; 12 Vic., ch. 35, sec. 33.

ROBINSON, C. J., delivered the judgment of the court.

We think the defendant is clearly right in this construction of the clause in question, and that if Mr. Wilmot by any inadvertence really included in his town plot of Belleville any part of the defendant's lot No. 5, he could not thereby make it actually any part of the town which he was instructed to lay out on lot No. 4, any more than he could have included in his survey the whole of the township, to the outer limits of lot No. 1. And at any rate, the defendant is entitled to raise the question to be solemnly discussed before a court and jury in a proper form of action, and is not to be bound by a summary decision before the mayor of Belleville, under a by-law of the town.

We think that the evidence clearly shewed this to be a case where a right was sincerely set up and was in question; and indeed, after all that has been before us judicially in reference to the conflicting claims of proprietors of the lots in Belleville, and the proprietors of the lot 5, we cannot be ignorant that what was disposed of by this summary conviction was not a question whether the defendant had criminally obstructed a travelled street in Belleville to the nuisance of Her Majesty's

subjects, but a question whether his fence was on lot 5 or off of it; in other words, whether it was where it had a right to be.

The statute of the province under which this conviction took place for an infringement of the by-law makes no exception of cases where a right is claimed, but the saving in the statute 4 and 5 Vic., ch. 26, sec. 4, and in 4 Wm. IV., ch. 4, sec. 16, shews the intention of the legislature in such cases; and the omission of a similar saving in this more recent act does not alter the principle of law. Whether the by-law itself makes any exception in favor of persons acting under color of right, we have not the opportunity of knowing.

Then, considering as we do that this was not a proper case for the adjudication of the mayor under the 72nd or 185th clause of the statute 12 Vic., ch. 81, does it not follow that the conviction should be quashed for that cause?

There are cases in which it has been held, that where a magistrate convicts summarily in a case in which he has not jurisdiction his conviction signifies nothing, and that the proper remedy is by action against him who executes any warrant made upon it, and not by application to quash what is simply a nullity. But in the case of *Rex* v *Jeffries*, 1 T. R. 241, and *The Queen* v. *Boulton*, 1 Ad. & Ell. N. S. 66, it seems to be clearly assumed that, when there is no jurisdiction, the conviction should be quashed.

In our opinion it does sufficiently appear on the evidence returned that this case was not one of the kind contemplated by the 12 Vic., ch. 81, sec. 60, and therefore we make the rule absolute.

We find nothing in the statute restraining a certiorari to remove such convictions.

Per Cur.—Rule absolute.

THE QUEEN EX REL. GAMBLE V. BURNSIDE AND MORGAN.

Mandamus—Tavern Licenses—Proof of Bye-Laws.

Mandamus refused which had been applied for for the purpose of directing a magistrate to revoke a certificate granted by him at an adjourned Quarter Sessions authorising the issue of a tavern license to A. B., for keeping a tavern in the Township of Vaughan—the said certificate of license having been granted in contravention of a by-law of the Municipal Council of Vaughan—no sufficient proof of the Bye-law having been given.

(Q. B., M. T., 14 Vic.)

Mr. Read, moved for a rule *nisi* for mandamus to be directed to the defendants, commanding the defendant Alexander Burnside, Esq., to revoke a certificate granted by him authorising the issue of a tavern

license to one Bernard McMahon, for keeping a tavern in the Township of Vaughan, and commanding Morgan, the other defendant, to revoke the license; because the said certificate and license were granted in contravention of a by-law of the Municipal Council of Vaughan, and because they were granted at an adjourned sessions of the peace, when there was no authority to grant licenses—or by which *mandamus* the said certificate and license shall be directed to be quashed and declared to be null and void by this court for the reason aforesaid, and to shew cause why Alexander Burnside, Esq., should not pay the costs of the application.

Hagarty, shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

Admitting that the license was irregularly granted at an adjourned sessions, if that were the only ground, we should have to consider whether Mr. Gamble could properly move against the order on that ground, for if he could, any other inhabitant of the township might; and the application should rather have been, I apprehend, to quash the order for the license than to call on the defendants by name as individuals to do acts which it is not competent to them to do. The ground on which the application was chiefly rested was the supposed disregard of the by-law, but we have nothing before us that we can recognise as proof of the by-law, or of the time when it was passed. The 198 sec. of the 12 Vic., ch. 81, points out how by-laws shall be proved in a court of justice, and we cannot regularly act on any inferior evidence of them.

We have nothing before us but a sort of printed hand-bill without seal or signature, or date to it. For all that we can see upon this paper, the law, if passed at all, may not have been passed till after the license was granted. Mr. Gamble states in his affidavit when it was passed, but that is not the evidence which should be before us on such a point.

We doubt also, whether such a by-law as is spoken of but not shewn, would be warranted by the 14th head of 31st clause of 13 Vic., ch. 81. That gives authority to the municipal council to limit the number of inns, by which we understand that they might have appointed a certain number which should not be exceeded. If they had done that, and communicated their regulation to the justices, then the latter could easily have avoided issuing a greater number; but it is a very different thing to declare that there shall be *no new inn*, and leave the justices to find out as they can whether any inn applied for is certainly a new inn.

We are clear, at any rate, that we cannot properly grant a mandamus as prayed; and as the rule has been moved with costs against the magistrates, we must discharge it with costs.

The matter of granting licenses being since provided for by a new law, under which similar questions cannot arise again, no material injury can arise from letting the license in question run out the few weeks that yet remain.

Per Cur.—Mandamus refused.

DOE DEM. TAYLOR AND WIFE V. SEXTON.

Statute of Limitations 4 William IV., ch. 1—possession held under an erroneous idea as to boundary.

Under the Statute of Limitations 4 Wm. IV., ch. 1, a possession inadvertently held under an erroneous impression as *to boundary*, with no intention of claiming the land otherwise than as it was supposed to form part of a certain lot covered by the party's deed would by mere lapse of time ripen into a title.

(Q. B., M. T., 14 Vic.)

Ejectment for the north-west corner of lot 22, in the 2nd concession of Hope, which the defendant insisted was part of the north-half of 23, in the 2nd concession.

Mrs. Taylor, one of the lessors of the plaintiff, claimed the lands in dispute as being part of the north-half of lot 22, in the 2nd concession of Hope, and there is no doubt that upon an accurate survey it was found to belong to that lot. No. 23 joined it on the west, and it was clearly proved that more than thirty years next before the beginning of this action Trueman Curtis, the owner of that lot, and the defendant, now Mrs. Sexton, his widow, since his death had been in actual occupation of the piece of land in question, having it cleared and cultivated. There was no dispute about the front angles of the lot 22, but in running the side line between 30 or 40 years ago, the compass course was adopted, and not the true meridional course, and owing to some local attraction at that place, the variation was greater than it generally was in the vicinity, and occasioned a difference of more than five chains by the time the line reached the end of the lot.

The line having been so run, and there being an allowance for road between the two lots, each party placed his fence up to the road, and has ever since occupied accordingly. There was evidence given at the trial, that both parties many years ago suspected the line was not a correct one, and expressed themselves dissatisfied with it, and spoke of having it more correctly run. The only question was whether the plaintiffs were not bound by the Statute of Limitations. The plaintiffs were non-suited at the trial.

Willson obtained a rule to set aside the non-suit. *Vankoughnet* shewed cause.

Cases cited—5 U. C. R. 285, 224, 602; 3 U. C. R. 411. 185; 6 U. C. R. 423; 10 Q. B. R. 130; 9 Q. B. Rep. 555, 363; 11 Jurist, 558; 1 U. C. Rep. 3; Draper's Rep. 386; *Denison* v. *Chew*, 6 & 7 Wm. IV.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the nonsuit was proper. It seems from the evidence that the plaintiffs and their predecessors were aware that the defendant, and her husband before her, were encroaching upon them, and yet they acquiesced so long that they have lost their remedy. The occupation has been actual and visible, and not constructive, and has continued more than thirty years. That it originated in error, and that for the greater part of the period, perhaps, the occupant of lot 23 had no intention of claiming title to any part of what should be found on an accurate survey to form a part of lot 22, can only have a material effect upon the consequences of such occupation, in those cases in which the question of the the possession, having been adverse or not, may still for any purpose be important to be determined.

Under the new Statute of Limitations, when twenty years have elapsed, during which the true owner has suffered himself to be dispossessed, neither receiving rent profits, nor being able to shew any written acknowledgment of his title within that period, he has lost his estate.

The decision of this court in the case of *Doe dem. Stewart* v. *Reddick*, Taylor's Rep. 676, decided in 1827, would go far to support the defendant's case even under the old Statute of Limitations, though I conceive that under that statute a possession inadvertently held under an erroneous impression as to boundary and with no intention of claiming the land otherwise than as it was supposed to form part of a certain lot covered by the party's deed, would not by mere lapse of time ripen into a title. The new statute, however, puts an end to all discussions about possession being adverse or not adverse; and we are clear that under its operation the plaintiffs have lost their remedy, and that the rule *nisi* for setting aside the non-suit must be discharged.

I have noticed in other cases the apparently hard operation of the new statute in cases of occupation held under a mistaken idea of the boundary, and particularly where a party, in consequence of being thus barred by lapse of time, is unable to obtain on the one side of him an indemnity for land which on an accurate adjustment of the boundary he is obliged to give up on the other, the effect of which may sometimes be to enable the same person to move his line upon his neighbours on one side of him by insisting upon an accurate survey, while he persists

in retaining land which he has himself wrongfully occupied on the other side of him for so long a time that his neighbour has lost his remedy. It really would seem but just, that when the true adjustment of the line would not disturb permament buildings, parties should be obliged to submit to the correction of an error notwithstanding any lapse of time, unless where there is evidence of a conventional line by which the parties have expressly agreed to be bound. We have no discretion, however, so to qualify the plain words of the statute 4 Wm. IV., ch. 1.

Per Cur.—Rule discharged.

NIAGARA FALLS ROAD COMPANY v. BENSON.

SAME v. HAMILTON.

Road Act, 12 Vic., ch. 84—necessity of complying with conditions of Act to entitle Company to sue for calls.

It is only when *the conditions* mentioned in the Road Act, 12 Vic., ch. 84, have been truly *and in fact* complied with, that the persons associated together can be *incorporated*, and sue in the short form given by the act, stockholders for the non-payment of calls; and *Held per Cur.*, that upon the facts of this case —the plaintiffs not having *bona fide* paid in the six per cent. on the capital subscribed, or registered the certificate, as the act required, could not sue the defendant, as a corporate company under the act, for the non-payment of calls upon his stock.

(Q. B., H. T., 15 Vic.)

The plaintiffs declared in debt, setting forth that the defendant, on the 20th of August, 1850, was and still is holder of divers, viz., twenty shares, in the stock of the said company, being a certain joint stock company for the construction of a certain road in Upper Canada, under an act passed in the 12th Victoria, entitled, &c.,—that is to say, a joint stock company for constructing and macadamizing a plank road from the Niagara Falls Suspension Bridge, in the township of Stamford, by the way of the village of Thorold and the town of St. Catherines, to Port Dalhousie, &c.; and that the defendant being such stockholder, then was and still is indebted to the plaintiffs in 50*l.* for divers, viz. four, calls of the sum of *ten shillings* each upon each of the said shares belonging to the defendant, whereby an action hath accrued by virtue of the act to the plaintiffs to demand from the defendant the sum of 40*l.*; yet that the defendant hath not paid, &c.

The defendant pleaded—1. *Nunquam indebitatus.*

2. That there is not and never was such a corporation as the supposed company in the declaration named and described.

3. That the defendant was not a shareholder in the said company as in the declaration stated.

4. That such calls were not, nor were, nor was any of them made as therein stated.

At the trial a verdict was taken for the plaintiff for 40*l.*, subject to the opinion of the court on these admitted facts; that at a meeting of the alleged directors of the company, held on the 4th July, 1850, it was ordered that the treasurer pay out of the funds of the company a note for 127*l.* 10*s.*, made by S. Zimmerman, Esq., and endorsed by Messrs. Raney and Merritt, on account of 450 shares taken by non-resident shareholders, which note was due and lying in the Montreal Bank on the 19th July instant; that in pursuance of that resolution, such note was paid up by and out of the funds of the company; that the said note made by Zimmerman, one of the directors, dated the 26th March, 1850, had been endorsed by two other directors of the company, and procured by Zimmerman to be discounted, and the proceeds paid to the treasurer of the company as the six per cent. upon the amount of those shares described as the shares of the non-resident shareholders, and that in no other way was any sum paid on account of those shares; that the names of the directors were inserted in the certificate on the 26th March, 1850, as having been on that day elected by a majority of stockholders, at a meeting called for that purpose, at which meeting the defendant was present and presided as chairman.

On the 2nd May, 1850, the president and treasurer of the company signed a certificate, stating that on the 26th of March, 1850, the undersigned shareholders had met and formed a company, according to the act; that the capital stock had been fixed at 5,000*l.*, in 1,000 shares of 5*l.* each; that the undersigned shareholders thereby agreed to pay the calls according to the statute, and the rules, regulations and by-laws of the company, to be made in that behalf; and they thereby nominated Messrs. Oswald, Zimmerman, James Merritt and Raney, to be the first directors of the company.

In the list or schedule which formed part of this certificate, Samuel Zimmerman subscribed for non-resident shareholders 450 shares, 2,250*l.*; and it was certified at the foot of the list by the president and treasurer, that the first instalment of six per cent. had been paid on the whole (1,009) shares, amounting to 307*l.* 14*s.* 0*d.*, and that the same had been lodged in the agency of the Bank of Montreal in St. Catherines, to the credit of the company.

This certificate was filed in the office of the registrar of the counties of Lincoln, Haldimand, and Welland, on the 2nd May, 1850.

Cameron, Q. C., for the plaintiff. *Vankoughnet* for the defendant. Cases cited—2 Exch. Rep. 119; 18 L. Jl. Exch.; 3 Exch. Rep. 108; 3 M. & Gr. 956.

ROBINSON, C. J., delivered the judgment of the court.

This case turns on the effect of our statute 12 Vic., ch. 84, the object of which is to enable person to associate themselves together for the purpose of effecting any public improvement of the kind mentioned in the act, and to give them by this general law certain corporate powers—in fact, to incorporate them by the operation of this act, without it being necessary for them to apply specially to the legislature for that purpose. But in order to entitle them to claim the advantages of this general statute, certain conditions specified in it must be first complied with.

It is contended that in this case these conditions have not been fulfilled, and that there is not in fact therefore such a corporation as is stated in this record to be plaintiffs in this action; and that the plaintiffs cannot have, under the act, a right to sue in this form for stock called in, according to the provisions of the statute referred to.

The requisities of the act are these:—1st. Before any number of persons can be held to be legally incorporated by virtue of its provisions, at least five persons must have subscribed stock sufficient in their judgment to complete the projected work.

2. And they must have executed an instrument in such a form as is given in the schedule—that is, at least five persons subscribing among them enough in their judgement to complete the work, must have executed such an instrument.

3. And they must have paid to the treasurer of *such intended company* six per cent. upon the capital stock intended to be raised—that is, six per cent. upon the whole necessary amount must be paid.

4. And they must have registered with the county registrar *such* instrument—that is, an instrument according to the form contained in schedule (not literally, but differing in no material point from the form), together with a receipt from the treasurer (of the company) for the six per cent. paid in.

We consider that it is only when these conditions have been truly and in fact complied with, that the persons associated can become incorporated; and that the setting up a delusive appearance only of their having been complied with will avail nothing, because fraud vitiates everything; and the words of the act are, that when these several things shall be done by the subscribers, *and* when (besides) the subscription shall have been registered, then the intended company shall, under the act, be incorporated; both must be done,—the registering that as done

which has not in fact been done, will not suffice: they are to do certain things, *and* make the required registration.

Under the 6th section, there can be no directors until six per cent. on the amount of stock subscribed as necessary has been paid in; and till a company has been formed as the act requires, there can be no corporation, no affairs of the corporation to manage, and consequently no directors to manage such affairs. The 7th clause confirms this view.

The 9th clause provides, that any company *so to be incorporated* may sue for calls; and unless we can hold that the plaintiffs were incorporated in accordance with the statute, they cannot avail themselves of the power given to sue for calls in this summary form.

The 10th clause contains provisions which enable such companies, when legally incorporated, to exercise powers very extensive over the property of others; but till the six per cent. on the capital subscribed has been *bona fide* paid in, the subscribers have no right to assume those powers. It would, indeed, have been most unwise to allow them to do so, for in that case the public would have no security that the whole was not a scheme of adventurers possessing no real capital, and wholly incapable of effecting the improvement. And yet it is clear that the subscribers could not be incapable of acting under that particular clause, and yet be held capable of suing for calls under the 9th clause. They must be legally in a condition to do all that the act allows them to do as a corporation, or be in a condition to do nothing as a corporation.

The 18th clause enacts that the directors *of any such company* may call in stock—that is, the directors of any company *formed and incorporated* under this act—for we can give no other meaning to the word "such."

I conceive that any intended company could clearly not impose tolls on any part of a road or other work finished, if they had not paid in their six per cent.; and that no municipal body could legally lend money under the 27th clause to subscribers calling themselves a company, if they knew that six per cent. had not in fact been paid in. If they could, then the whole work might be made with money borrowed from the municipal body by a company who had paid nothing themselves, and had merely registered a delusive certificate.

The 29th clause provides, that any action *to be brought by any such company* for stock called in, it shall be sufficient to give certain facts in evidence. It has been argued in the case before us, that upon the trial of this cause all was proved which this clause requires; but was it proved in an action brought *by any such company*—that is, by a company formed and incorporated agreeably to the act—for if not, then this

clause does not apply, and the evidence would not be made sufficient by the statute. The 30th clause relieves the company from the necessity of proving in any such action the appointment of the directors; but it does not exclude proof on the other side of the fact that there can be no legal directors of such a company under the act.

Upon this review of the act, and after considering the facts proved and admitted in this case, we are clear that the defendant was entitled to a verdict. It was not a compliance with the act as regards the payment in of six per cent. stock on the capital subscribed, when upon a note made by one and endorsed by the others of those who were afterwards, as we may suppose, though on the same day, chosen directors, a discount was obtained at a bank for nearly half the amount necessary to be paid in, which money was afterwards, by resolution of the directors, directed to be taken out of the funds of the company and used in paying up the note when it came to maturity. The whole of the six per cent. might as well have been obtained and paid out again in the same manner, and then there would have been a company acting absolutely without funds, availing themselves of all the privileges granted by the act.

It would be absurd to hold that the six per cent. was ever paid in as the act required; for when we see the funds so misapplied, the fair presumption is, that what was done by the directors in July was contemplated by the same directors in March, and that the money was only paid in to be taken out again, and was therefore only a colorable, not a real payment.

Besides, the certificate registered does not appear to be such a one as the statute requires, for it omits the important words "do hereby agree to take and accept the number of shares set by us opposite to our respective signatures," which is really of the very essence of the instrument, for without them the undertaking "to pay the calls thereon" has no proper application.

We think the defendant entitled to the postea on the three first issues. It was probably intended that we need not distinguish as to the several issues, but should give judgment of non-suit, if we thought the plaintiffs not entitled to succeed, and the case seems to have been left on that footing at Nisi Prius.

Per Cur.—Postea to the defendant.

In the case against Hamilton the pleadings were similar to those in the last. It is an action by a similar company against the defendant for calls, as being a shareholder in the alleged company. The same facts that disable the plaintiffs from recovering as a corporation in the former

case, must equally disable them in this. A verdict was rendered for the plaintiff by consent, subject to our opinions. It is unnecessary to consider the additional objection raised in this case, that the instrument registered was not the one actually subscribed by the defendant.

Per Cur.—Postea to the defendant.

BOWLBY v. WOODLEY.

10 & 11 *Vic., ch. 5, as to twenty years' user of water running against the crown.*

A defendant having for more than twenty years next before the bringing of the action penned back water upon the land above him by means of a dam erected on his own land, is protected by our statute 10 & 11 Vic., ch. 5, *although* the land flooded by the backwater *belonged to the crown* during the greater part of the period.

(Q. B., E. T., 15 Vic.)

Case for obstructing a stream running through the plaintiff's land by erecting a dam on the stream lower down, and thereby causing the water to overflow the plaintiff's land, in the township of Townsend.

Pleas:—1st. Not guilty.

2nd. Statute of Limitations, on which the plaintiff took issue.

3rd. Plaintiff not possessed of the close whereon, &c.

4th. The defendant pleaded prescription, setting forth in substance that he was and is occupier of certain lands, and of *a saw mill* thereon on the same stream below the plaintiff's land, and that the said stream *did for more* than twenty years before the commencement of this suit, and at the said several times when, &c., run and flow through and past the land and premises in the defendant's occupation; that the defendant and others, the occupants of the said premises, *had as such occupiers actually enjoyed as of right and without interruption*, for the full period of twenty years before the commencement of this suit, a certain right and easement of creating dams, &c., across the stream on their lands, of a sufficient height to raise the water nine feet above the natural level of the stream, for the better enjoyment of the water and the due working of their mill; and that the defendant at the said time when, &c., being the occupier, and having occasion to work the said mill, in the exercise of his said right and easement, and because it was necessary to the due working of his mill and the due enjoyment of the said stream, erected the dam complained of, of the *height above mentioned, and no higher* —that is to say, sufficient to pen back the water of the stream nine feet, but no higher, &c.

In the 5th plea the defendant prescribed as occupant of *land* only, lower down on the stream, saying nothing of any mill—and for a right

and easement to dam the stream so as to raise the water nine feet above its usual height, for the better enjoyment of the use of the waters of the stream.

The plaintiff replied to the 4th and 5th pleas, that the defendant and those, &c., as occupants of the tenements in the respective pleas mentioned, did not, for the full period of twenty years before the commencement of this suit, actually enjoy, nor were they accustomed to enjoy, as of right and without interruption, the said supposed right and easements as to the said lands with the appurtenances belonging, in manner and form, &c.

On the trial, the plaintiff's title to his land was shewn, being a patent from the crown to the plaintiff for the north ½ of 10 in the 4th concession of Townsend, dated 3d July, 1847, registered 22nd July, 1847; and it was admitted that the defendant's dam was erected thirty-six years ago.

It was proved that about 5½ acres of the plaintiff's land was overflowed by the dam of the defendant, as originally erected; and that for seven or eight years past a greater quantity of land, in all from 15 to 20 acres, has been overflowed, chiefly woodland. It was admitted that to whatever extent the land has been overflowed, the backwater has been occasioned by the defendant's dam. How the height of water had been increased of late years, whether by raising the dam or tightening it, was not shewn.

It was contended by the defendant that he was protected by our statute 10 & 11 Vic., ch. 5, secs. 2 & 8; and it was agreed that the plaintiff should take a verdict, subject to the opinion of the court on that point.

H. J. Boulton, Q. C., and *Galt*, for the plaintiff. *Freeman* for the defendant. Authorities referred to—10 & 11 Vic., ch. 5, sec. 8; 5 Tyr. 85; 11 Ea. R. 374; 5 B. & C. 232; 8 Ea. R. 309; 4 B. & Al. 580; Gale on Easements, 6, 108; 1 C. M. & R. 217.

ROBINSON, C. J., delivered the judgment of the court.

The question we are called upon to determine seems to be this: whether the defendant, having for more than twenty years next before the bringing of this action penned back water upon the land above him, by means of a dam erected on his own land, is protected by our statute 10 & 11 Vic., ch. 5—an act similar to the English Prescription Act, 2 & 3 Wm. IV., ch. 71—although the land flooded by the backwater belonged to the crown during the greater part of that period, having been first granted by the crown to the plaintiff about three years before this action was brought.

I think, looking at the terms of our statute, and the exposition which

similar enactments in the English statute have received in England since its passing, there can be no question that the defendant is entitled to succeed on these pleadings on his establishing a right to back water *to any extent* on the plaintiff's land.

I consider that the right or privilege claimed by the defendant, of backing water on the land, is an easement coming within the second clause of our statute, because it is an easement to which a title may be acquired by custom, prescription or *grant*, and certainly as against the crown by grant as against an individual; that the evidence shewing an uninterupted enjoyment for twenty years next before this action brought, without any permission obtained or asked, and enjoyed openly, not covertly or by stealth, as the fact must have been from the very nature of the easement itself, we are to take it that the defendant enjoyed it, "*Claiming right thereto;*" that this case being made on one side, and nothing shewn to rebut it on the other, the statute leaves nothing necessary to be found by the jury, but establishes the right as a legal consequence; and that whatever might formerly have been the difference between the cases of the crown and of a private individual, founded on the royal prerogative, and the principle of *nullum tempus occurrit regi*, it is to this statute we must now look for what will be sufficient to make out a *prima facie* case for presuming a grant; and after twenty years' enjoyment has been had of this kind of easement, such as in the case of a subject trespassed upon might raise the implication of a grant, the provisions of this statute will now apply as well to the case of the crown as of a subject. The 8th clause, which is peculiar to our statute, shews that the legislature intended that to be the effect of the 2nd clause.

As to the point taken, that the statute has not a retrospective effect —I see nothing in the act to support any other view of it than that it came into effect on the first January, 1848, and that after that day whenever a party shall shew such an enjoyment as to bring him within the statute, he is to have the benefit of the statute in the same manner as if it had been always the law of the land. I think a non-suit should be entered.

DRAPER, J.—In the present case the defendant pleads an easement enjoyed as of right for twenty years and upwards next before the commencement of this suit. The plaintiff only denies such enjoyment. The evidence shews such enjoyment for more than thirty years; and the plaintiff's answer is, that the crown only granted the land by patent dated 3rd July, 1847—consequently, that prior to that date the land must be taken to have been vested in the crown, and that except for

this statute there would have been no prescription against the crown; that, as the crown had parted with its estate in this lot before it was passed, the plaintiff acquired it free from any prescriptive right prior to the date of the patent; and that the plea therefore is not sustained.

Upon this, it appears to me, two questions arise—first, whether the facts relied upon by the plaintiff will exclude the operation of the statute; and secondly, whether it is open to the plaintiff to sue them upon these pleadings.

I think that an enjoyment within the limits of a surveyed township of a right for thirty years under the first section of the act, or for twenty years under the second section, will, in the absence of anything to qualify such enjoyment, prevail against the crown (*a*); and that the statute is retrospective in its operation, and not limited to enjoyment since it was passed. This is, so far as I can judge, the result of the 1st, 2nd, and 8th sections of the act. My present impression is, further—that admitting the defendant to have enjoyed the easement pleaded for more than thirty years after the township was surveyed, and while the crown owned the land, that the plaintiff would not be able to deprive him of the right so acquired, by shewing that the crown granted him the land before the passing of the act. I incline strongly to the opinion that the patentee of the crown in such a case would be bound equally with the crown by the operation of the act. It does not, however, appear to me necessary to determine this point, and I trust it is as open for further argument and consideration; for whichever way it may be finally resolved, I do not think it is open to the plaintiff to set it up under these pleadings.

The words of the fifth section of our statute are exactly similar to those of the corresponding section of the imperial statute, and provide that "if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement or other matter hereinbefore mentioned, or on any cause or matter of fact or law *not inconsistent with the simple fact of enjoyment*, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

Almost the very words, *mutatis mutandis*, of the judgment in *Pye* v. *Mumford* (12 Jurist, 579), are applicable. The seizin of the crown,

(*a*) The Crown is not bound by a statute unless expressly named in it; but in the statute here referred to (10 & 11 Vic., ch. 5, now Con. Stat. U. C., ch. 88, secs. 33–44), the Crown is specially named, and it is provided that the right may accrue against the Crown when the land, way, easement, or watercourse or other matter, shall lie and be situate within a town or township duly surveyed and laid out by proper authority.

and the grant prior to the passing of the act, are clearly matters not inconsistent with the simple fact of enjoyment; and therefore, if they be in the words of the defendant's plea, it is plain by the express answer to the fifth section they ought to be replied, and cannot be received on the traverse taken.

The verdict therefore, ought in my opinion, to be entered for the defendant on the fourth and fifth issues. It will be for the plaintiff to consider whether it is worth his while to apply for leave to amend his pleadings. Such leave was granted both in *Clayton* v. *Corby* (2 Q. B. 813) and *Pye* v. *Mumford*; upon pleadings arising on the first section of the statute, and upon the facts appearing, it is most probable the plaintiff might have succeeded if he had replied differently.

BURNS, J., concurred.

Per Cur.—Rule absolute for non-suit.

THE QUEEN EX REL. LAWRENCE V. WOODRUFF.

Township council act, 12 Vic., ch. 81—quo warranto—right of relator to attack the existence of council by quo warranto in one proceeding against every member of council by name.

It is not permitted to private relator under our act 12 Vic., ch. 81, either to attack by writ of summons in the nature of a *quo warranto*, the Township Council by name, upon grounds which, if sustained, must necessarily lead the dissolution of the body, or to attack the whole Council in *one* proceeding, through the individual names of every member of it.

(Q. B., H. T., 15 Vic.)

In this case a writ of summons in the nature of a *quo warranto* was issued under the statute 12 Vic., ch. 81, against all the five councillors for the township of Niagara, at the instance of a private relator, who was a candidate at the same election, being the first that was held for the township under the statute.

The objection relied upon as making void the election, applied equally to all the five defendants, and it was, that the returning officer closed the poll at the expiration of the time allowed for polling on the first day of the election, and returned the five defendants as elected, refusing to adjourn the poll till the following morning, although several votes were given within less than half an hour before the poll was closed, and though there were many others remaining in the township unpolled.

The proceeding was carried on under the statute before Mr. Justice Draper in vacation, who in giving judgment observed that a consideration of the statute and of the probable inconvenience of a different course of proceeding, had brought him to the conviction that there could not be a judgment against the defendants on the writ, but that they

must be dismissed and discharged therefrom, although his judgment would not involve any decision in favour of the right to the office. And he did accordingly dismiss the proceeding, but without giving costs against the relator, for reasons stated in the note of the judgment reported in page 119 of the printed cases in chambers.

Mr. Vankoughnet moved, under the 152 clause of the act, to reverse this decision; contending that the cause taken in dismissing the case was erroneous. *Eccles* shewed cause. Cases cited—2 Burr. 869; 10 B. & C. 230; 5 A. & E. 613; 2 Chamber Rep. 119; 2 M. & S. 15; 4 Q. B. R. 146.

ROBINSON, C. J., delivered the judgment of the court.

The learned counsel, Mr. Vankoughnet, argued the case as if he appeared to be under the impression that Mr. Justice Draper determined against the relator on the broad ground that without reference to the form and nature of his proceeding, he could not be permitted as a private relator to call in question the right of every member of the corporation to the office to which they had been elected, merely because it might result from the impeaching the right of every member of the council that the corporation would be in fact dissolved; the grounds on which he complained being equally applicable to the case of each one of the members. That was not the opinion of the learned judge, as the authorities which he cited clearly shew, for they contain repeated opinions of the courts in England that the principle now to be considered is not to be carried that length.

What Mr. Justice Draper held was, that by the course which appears to be taken in proceedings by *quo warranto* in England, it is not permitted to a private relator to question the right of all the members of a corporation to their office in one summons, making them joint defendants upon grounds applying equally to all, when the inevitable effect of a judgment against the defendants, though complained of by their individual names as members, might be to dissolve the body.

Mr. Vankoughnet maintains that the mere consequence of dissolving the corporation in effect by the judgment which this court may find it necessary to give, is not of itself a sufficient reason for the court refusing to entertain such a proceeding as has been adopted in the present instant, and that it is competent to a private relator to pursue his remedy by joint proceeding as has been done in this case, with no other restrictions than these—namely, that he cannot be permitted to attack the corporation in their collective capacity as a corporation, and cannot question in any form of proceeding their right, however elected, to exercise such a franchise as they are assuming to exercise, or call them

to account for any abuse of their corporate powers; for that it must be left to the crown to direct any prosecution upon such grounds.

My two brother Judges, who have both, it appears, had occasion to act in different stages of this same proceeding against the election of the township councillors for Niagara, have brought themselves, on a careful examination of authority, to the conclusion that such a proceeding as was adopted in this case is contrary to the principles which govern the remedy by *quo warranto;* and that being so, it is of no consequence to the decision of this motion in the nature of an appeal from Mr Justice Draper's decision, what judgment I might form in the matter. I do not differ in opinion from my brothers, but have always considered that the course which happened to be adopted in this case, of joining all the members of the council in one writ, was not a proper proceeding; and I still think so, and would have given my reasons more at length, if the time permitted; but the tenure of office being only for a year, which is drawing to a close, it is desirable that the opinion of the court should be made known without delay.

I shall therefore only add, that to allow a proceeding of this kind, against the whole council in fact, though not so in form, by including unnecessarily in one summons every member of the body, and in effect calling directly and immediately in question the very right of the body to exist, would lead, as it seems to me, to inconveniences which the courts in England are careful to avoid; for it is material to remark, that the statute 9 Anne, ch. 20, sec. 4, contemplates, as I think, the filing of a separate information against any individual member as being the proceeding properly within the power of the party; for it provides that if it shall appear to the respective courts that the several rights of divers persons to the offices or franchises may properly be determined on one information, it shall be lawful for the court to give leave to exhibit one such information against several persons, in order to try their respective rights.

In the case referred to, of *Rex* v. *The Corporation of Camaerthen* (2 Burr. 869), after the court had determined that they could not grant leave at the instance of a private relator to file an information against a corporate body, to shew by what right they claimed to act as a corporation, the counsel, we are told, made their motions against the several individuals to shew by what authority they respectively claimed to exercise their particular functions, and obtained the ordinary rules against them in the usual form, which I infer were for several informations, which the court might consolidate or not, as they might find convenient.

The right of the defendants severally to disclaim, it is said, would be embarrassed by allowing a joint proceeding in the first instance, and as

of course. It is easy, I think, to see that to allow a summons to go of course under our statute against all the members of a council, as it would be opposed, apparently, to the spirit of the act, would lead to great inconveniences, if the general rule, which prevents such a proceeding at the instance of a private relator as might lead, by our judgment, to the entire dissolution of the body, could be evaded by merely attacking the whole corporation in one proceeding through the individual names of each member of it.

The last election, for instance, instead of being closed, as it is alleged, too soon, might have been commenced too soon, and held on a day when by law it could not be held; and in such a case and in others that might be supposed, a private relator might ground a proceeding which in truth would directly strike at the existence of the whole body upon a complaint against each individual member included in one summons.

Instead of alleging that the whole corporation was exercising the franchise without legal authority, he would in that case be doing the same thing in effect by alleging that every member had been illegally chosen, and thus calling for a judgment in one case which would inevitably, if he succeeded, dissolve the body. He might no doubt arrive at the same end by a separate proceeding against each, and that the court could not help: but I think it inconsistent with the principles which govern in these cases, that he should to do so in one case, and to ask for a judgment which, if given, must dissolve the corporation, and in the case before us would leave no means of electing successors.

My brothers, as I understand, retain the opinion they had already formed: and the rule therefore must be discharged.

It is to be remarked that in this case the defendants are called on by the summons jointly to shew cause, not by any words contained in it aiming to separate the case of one from the others in form or in effect.

Per Cur.—Rule discharged. (*a*)

(*a*) A writ of *quo warranto* will not be granted against a body of persons claiming the franchise collectively. Where such a writ was applied for in the case of the Borough of Sutherland, the Court discharged the rule saying, that an information against a whole corporation as a body to shew by what authority they claim to be a corporation can be brought only by and in the name of the Attorney General (*Rex* v. *Ogden*, 10 B. & C. 280). Where a *quo warranto* was asked on behalf of a private individual in the name of Her Majesty's Attorney General, the Court in making the rule absolute treated the reference to the Attorney General as surplusage, and directed the rule to issue in the right form (*Reg. ex rel. Hart* v. *Lindsey*, 18 U. C. Q. B. 51.)

In re Conger and the Municipal Council of the County of Peterborough.

Quashing By-law of municipal council for the appropriation of money for roads—Entitling of rule nisi.

Held per Cur.—That the by-law passed by the Peterboro' Municipal Council, under the provisions of our act 12 Vic., ch. 81, sec. 41, 11th and 16th heads, appropriating 600*l.* from the county funds of the county of Peterboro' to be expended on certain roads within the said county in such manner as may be deemed most proper by the commissioners appointed for that purpose, &c., is illegal, as exceeding his authority given to the council, and that the rule nisi for quashing it must be made absolute.

The entitling of the rule to quash the by-law of a municipal council need not be *The Queen* v. *The Council*, but as in the matter of *A. B. and the Council.*

(Q. B., H. T., 15 Vic.)

In this case a rule nisi was obtained by *Cameron*, Q. C., to quash a by-law of the Municipal Council of Peterboro', passed on the 22nd of June, 1850, entitled a by-law to appropriate the sum of 600*l.* from the funds of the County of Peterbero' for road purposes, and to provide for the distribution and expenditure of the same, on the ground that such a by-law was illegal, and beyond the jurisdiction of the county council to pass. The rule was moved with costs.

The by-law enacted—1st, *that 600l. be appropriated from the county funds of the County of Peterboro', to be expended on certain roads within the said county, in such manner as may be deemed most proper by the commissioners appointed for that purpose.*

2nd. That the said 600*l.* be distributed among the different municipalities of the said county in proportion to the amount the said municipalities may have contributed from the county funds from all sources, during the last year.

3rd. That the township councillors of the different municipalities, and the town councillors of the town of Peterborough, be appointed commissioners for the expenditure of whatever money may be appropriated to their respective municipalities agreeably to the wishes of a majority of the said commissioners, and to report to the next meeting of the council that may be held after the expenditure of the said monies, how they have been disposed of.

4th. That the county clerk be directed forthwith to make the apportionment required by this by-law, and to furnish a copy to the county treasurer, and to notify to the town reeves of the different municipalities the amount apportioned to their different municipalities as soon as made.

5th. That the county treasurer be authorized to pay to the order of the commissioners, or a majority of them, the whole or any part of the monies thereby authorized to be appropriated agreeable to the appointment forwarded to him by the county clerk.

The by-law was duly certified according to the act; and an affidavit was made by one Wallis, "that the applicant during all the year 1850 hath been, and that he now is, a resident of and within the limits and boundaries of the town of Peterboro', a corporation within the said county of Peterboro'."

The applicant, Mr. Conger, in his affidavit identifying the copy of the by-law as the one received from the clerk of the council, swore also that he was a resident of the county of Peterboro'.

D. B. Read shewed cause. Authorities referred to; 12 Vic., ch. 81; 1 Burr. 239; Willcock 88; Carth. 119; Temp. Hard. 285; 3 P. & D. 282; 8 Q. B. 926; 10 A. & E. 386.

ROBINSON, C. J., delivered the judgment of the court.

With respect to the preliminary objections taken by the counsel for the Peterboro' County Council in shewing cause against this rule, we think the affidavits of Mr Wallace and Mr. Conger sufficiently described Mr. Conger as a resident of the county of Peterboro', and entitle him to make this application under the 156th clause of the act.

As to the entitling of the rule, it is objected that it should have been entitled *The Queen* v. *The Municipal Council, &c.* Rules to quash orders of the justices in sessions are usually so entitled; and that style is used in proceedings upon prerogative writs. In England, when the orders or resolutions of municipal bodies are brought forward before the courts, it is by *certiorari*, and the proceedings are entitled *The Queen against The Council, &c.* But I see no reason that should make it proper in this case. The by-law is not like an order made in a court of justice. It is a legislative act, in regard to which the Crown does not intervene by any of its officers, and over which the legislature have, by an express enactment, given control to the superior common law court without the formality of any writ; and we think the rule is not improperly entitled *In the matter of William Seymour Conger and the Municipal Council of the County of Peterboro'*.

The objections urged against the by-law are next to be considered. The legislature has committed extensive powers to these municipal bodies, and has endeavored to define their powers so as to exclude, if possible, any doubts as to what they may legally do. They have in the same general law thrown the duty upon us to take care that the council do not in the execution of these powers go beyond their limits as prescribed by law. I am persuaded that it would be attended with great public inconvenience if in exercising this control we were to look in a captious spirit at the by-laws of the several municipal bodies, and were to require that everything necessary to establish their validity should appear upon the face of them.

The case of *The Queen* v. *Gayer* (1 Burr. 245), will shew how orders of justices are treated in this respect when brought before the courts in England; and we may assume that a less liberal construction is not to be given to the by-laws of the municipal bodies. The cases of *The Queen* v. *The Town Council of Litchfield* (4 Q. B. R. 893), and *The Queen* v. *The Town Council of Warwick* (4 Q. B. R. 926), on the other hand, will shew that the courts are strict in exacting from these corporate bodies a conformity to the law; and it is necessary for the protection of those whose interests may be affected by their acts that such a control should be vested somewhere, and should be so exercised as to make it effectual for keeping them within the bounds of their charter, and within the reasonable principles established by the common law in some particulars on which the statute law is silent.

The complaint against the by-law now before us is, that it appropriates a large sum of money, 600*l.*, in a manner not warranted by the statute 12 Vic., ch. 81, or by any other authority; and we are of opinion that this is so, and that the by-law is illegal.

It is not necessary to look out of the statute just referred to. The amending act passed in the last session, 13 & 14 Vic., ch. 64, contains nothing that I perceive applies to the question. The clauses of the former act which seem material to be referred to are the 32nd, 37th, 38th, 39th and 41st, in the 11th and 16th heads, clauses 155 and 175; and indeed some of these have rather an apparent than a real bearing on the question.

The 41st sec., 11th and 16th heads, bear most directly upon it. The purposes for which the Council may pass by-laws are enumerated in the 41st sec.; and neither in that clause nor anywhere else in the act is authority given to the Council to make grants of money to townships "to be expended on certain roads within the county" (which, being nowhere defined, means any roads), "in such manner as the *township* and *town councillors* may think proper."

The objections to the by-law are, that it appropriates county funds to what may be purely township roads—I mean roads wholly internal, which is opposed to the whole intention and spirit of the act—and that it delegates to other commissioners, the discretion to select the particular roads to be improved, and to expend the money upon them; whereas the statute gives each County Council only the power to make or improve county roads of a more general character, or by a specific measure to aid by loan or otherwise some road or bridge in a township which such County Council "may think of sufficient importance, with a view to the general interest of the county, to afford such assistance to it."

This is no measure of that kind, but is a measure placing unreservedly at the disposal of the local councils a large sum of money for them to expend on roads as they like. Not one of those roads may be other than purely internal township roads; and this by-law so completely deprives the County Council of all the discretion and control which the provincial statute intends they should exercise, that it requires only a report to be made by the local councils of what has become of the money at the next meeting after they shall have expended it all.

If we could see on the face of the by-law or on the act that this 600*l.* is or could be money which the county council could legally so appropriate, then we might be asked to support its validity by making every reasonable intendment in its favor; but we find no ground for holding that the County Council could have funds derived from any source which they could properly grant as they have done.

In the by-law the money so voted is called money "from the county funds." We find no authority for saying that they could have had any county funds of which they could legally make such a deposition.

It was suggested in the argument that it may have been, or rather I believe it was stated that it was the balance remaining in the hands of the district council of the proceeds of the wild land assessment act; and the council might think it not wrong, morally speaking—but, on the contrary, fair and reasonable—to distribute it ratably among the townships to be expended without their own intervention in local improvements; but it cannot be denied that the statute gives them no such power.

If the legislature had considered it just to direct any balance of district funds which might be in hand at the commencement of a new system to be handed over to the local councils, then the matter would have stood on a different ground. But the statute not only contains no such provision, but it ties up the county councils to other modes of applying their funds, which are wholly inconsistent with such a distribution.

There was no doubt nothing was done wrong intentionally. The by-law, on the contrary, is conceived in a liberal spirit; but it is opposed to the statute, and we cannot do otherwise than quash it.

Per Cur.—Rule absolute to quash by-law.

MUNICIPAL COUNCIL OF NORTHUMBERLAND AND DURHAM v. BULL AND MEYERS.

12 Vic., ch. 81, secs. 175 and 176—Right of township councils or county councils to sue for a local debt due to old district councils.

Under the 175th and 176th clauses of the 12 Vic., ch. 81, the township councils and not the *county* councils, are entitled to receive monies due to the old district councils, were the debt is due to the *locality*, as for making roads in a township, &c., and *Held per Cur.*, that in this action the money sued for, belonging to the township council, and not to the county council, the plaintiffs, (the county council) must be non-suited.

(Q. B., M. T., 15 Vic.)

The plaintiff's commenced their declaration by averring that, before the 1st January, 1850, the then Council of the District of Newcastle, by a writ issued on the 21st of July, 1849, from this court, attached these defendants, to answer the said Council of the District of Newcastle in a plea of trespass on the case upon promises; that after the defendants had been served with a copy of the writ, and before declaration it was enacted by the stat. 12 Vic., ch. 78, that the territorial division of Upper Canada into districts should be abolished, and that the officers of each of the then districts should have the title or denomination of officers of the county or united counties composing what was formerly the district; that by the same act the District of Newcastle was to be known by the name of the United Counties of Northumberland and Durham; and that by another statute (12 Vic., ch. 81) the inhabitants of those united counties were made a corporation after the 1st of January, 1850, under the name of the Municipal Council of the United Counties of Northumberland and Durham; and that they are now the plaintiffs in this suit, in the place of "the Council of the District of Newcastle."

The plaintiffs then proceeded to declare against the defendants in assumpsit, setting forth that the defendants, on the 1st of June, 1848, in consideration that the plaintiffs, at the request of the defendants, would pay to the defendants a large sum of money—to wit, 500*l.*—to be expended by the defendants for and on account of the plaintiffs, the defendants then promised the plaintiffs that they would, on being thereunto requested, duly account for the same; that the plaintiffs did, on the day aforesaid, &c., pay to the defendants the said 500*l.*, to be laid out for the plaintiffs; and that after a reasonable time—to wit, on 1st July, 1849—they requested the defendants to account for the same, yet that the defendant have not accounted, &c.; adding common counts for money paid, money had and received and on account stated, laying promises, in conclusion, to pay *the plaintiffs* on request.

The defendant Bull pleaded—first, the general issue.

Second, to the first count, that the plaintiffs did not request the defendants to render an account, in manner and form, &c.

Third, to *the second* count, (which was for money paid to the defendants by the plaintiffs), payment.

Fourth, to the same count, a set off.

The defendant Meyers pleaded separately similar pleas.

On the 22nd of May, 1847, a by-law was passed by the Council of the District of Newcastle, appropriating certain specified sums of money to be expended on roads in the townships named in the by-law, and providing that "the councillor or councillors of the several townships should be authorized to expend the said sums on the roads and bridges in their respective townships, in such manner as they may think fit and necessary;" that it should be lawful for the district treasurer to pay the orders of the councillor or councillors of townships within the limits of the appropriations mentioned in the by-law; and that the councillors should make a just and true return to the council at its next meeting, (in November, 1847,) of all monies expended under the authority of the by-laws.

The sum allotted to the township of Hamilton, in the by-law, was 219*l.*; and the by-law provides that the councillor or councillors of townships might appoint such persons as they might deem necessary to lay out any sums of money which they might decide upon expending; and that no greater sum than three-fourths of the funds placed at the disposal of the councillors of each township should be drawn from the treasurer before the 1st of January, 1848.

On the 24th of May, 1847, the defendant Bull received from the district treasurer 50*l.*, for which he gave his individual receipt as a district councillor.

On the 27th of July, 1847, he drew an order on the treasurer in favour of one Jellet or order for 100*l.*, *out of the funds of the Township of Murray*. And on the 4th of September 1847, he drew another order on the treasurer, in favour of Mr Jellet, for 150*l.*, to be paid out of the funds of the township of Murray; upon which last order Jellet paid by the treasurer 120*l.* and no more.

This made up 270*l.* advanced to Mr. Bull, one of the defendants and one of the councillors for Murray serving in the District Council, but for which money the plaintiffs contended the other defendant, Myers, being the other councillor serving for Murray, was also answereable, not merely because he was a councillor authorized with Bull to receive the

money voted for Murray, but upon evidence which they produced to shew that the money had been paid into Bull's hands with Meyer's sanction and at his request, and that his conduct and admissions at the time and since, in regard to the money so paid over, made him both legally and justly accountable with Bull for the money.

On what authority any excess above the 219*l.* granted by the by-law was paid to Bull did not appear in the evidence; but it was shewn that the defendants had between them made certain payments on account of work done, which left the sum of 142*l.* yet unaccounted for—and this the plaintiffs claimed to recover in this action, with interest.

The point chiefly contested at the trial was the legal liability of Meyers, who had received no part of the money from the treasurer. It was contended that Bull, who had alone received it all, was the only person responsible, and consequently that the plaintiffs must be non-suited. The learned Judge (Sullivan), however, considered that both were liable as joint receivers, upon the evidence given. He did not direct the allowance of interest, but left that in the discretion of the jury, and they disallowed it, and gave their verdict for the plaintiffs for 142*l.*

The defendants, by *A. Wilson, Q. C.*, obtained a rule for a non-suit, not only on the ground that the defendants were not shewn to be jointly liable, but on several legal exceptions taken at the trial, and which the learned judge reserved for discussion in banc. These were—

1st, That the by-law referred to was invalid for want of the seal of the District Council.

2nd, That it was illegal to authorise the payment of the money into the hands of the township councillors.

3rd, That the action, if any would lie, should have been brought by the township council of Murray, incorporated under the stat. 12 Vic. ch. 81, and not by the county council, which had no interest in the money and could not appropriate it, and which did not represent and is not identical in substance with the late District Council; and that if any implied contract arose from the transaction it was not continued in favour of the county council but of the township council.

4th, That at any rate the assumpsit, as specially laid in the first count, was not supported.

Vankoughnet, Q. C., shewed cause. Cases cited—Jenkins 99 Pl. 94, 3 Lev. 237, 1 Saund. 343, Viner's Abr. Corp. 1. 3.

ROBINSON, C. J., delivered the judgment of the court.

If the county council established by 12 Vic. ch. 78 were clearly the same corporation in substance and effect with the District Council that

had before existed, and was merely substituted for it, having the same rights, authority, liability and duties, and being the same thing in fact under another name, then the change of name might have occasioned no impediment to their suing on this cause of action. In reason this should be so, even without any provision being expressly made for it; and the cases cited by Mr. Wilson on the argument, of the *Mayor, &c.*, of *Scarboro* v. *Butler*, 3 Lev. 237; and *Mellor* v. *Spateman*, 1 Saunders, 343, shew that there would be no difficulty on that technical ground.

The learned judge, we think, took a right view, at the trial, of the evidence as it applied to the question of Meyer's liability; and we consider that the verdict finding Meyers to be liable, as well as Bull, was warranted by the evidence. He would not have been liable for the money merely because he was one of the district councillors who were authorised to expend the money, and because his colleague had in fact received it. The district does not seem to have intended by their by-law that the councillors for Murray should have the money paid into their hands, and so become public accountants themselves; but only that they should have the superintendence and direction of the labor to be applied, and were to employ persons to do it. They should have let the money remain in the treasurer's hands, and should have given orders upon him to the persons who did the work. But Bull did apply to the treasurer, and received it; and there is evidence to shew that his so receiving it was with the assent of Meyers, and in some measure he alone at his instance; and not merely that Meyers was willing that he should receive it, and be alone accountable for it, but that Meyers assented that the money if paid to Bull should be looked upon as if paid to both upon their joint liability, and to be accounted for by the two.

It is not necessary to say whether, if the jury had placed another construction upon Meyers' acts and declarations, we should have overruled their decision; but, having taken that view of it which they have, we consider that there was enough on the evidence to support that view.

The question then remains—to whom are they liable? The 55th clause of 12 Vic. chap 78, provides that all the public property, both real and personal, of the several districts in Upper Canada shall become the property of and vested in the municipal corporations of the counties to which the judicial and other proceedings pending in such districts are by that act transferred.

The judicial proceedings pending in the District of Newcastle are by that act transferred to the united counties of Northumberland and Durham, and the new corporation now represents the same territory

that the district council did. The money of the district, no doubt, as public property (personal), would, under the words of this clause, become then under this act the property of the county council, and be vested in it—that is, the right and claim to it would vest in the council if it depended only on that clause; but then we must consider the stat. 12 Vic., ch. 81, which organizes county and township councils and defines their authority and powers, and must see whether the right to this unexpended money lying in the defendant's hands belongs to the township council or the county council.

If the districts had been left as they were, with their councils and the 12th Vic., chap. 81, had constituted the township councils with the same powers as are given to them, would it have been in the power of the district council to enforce the payment of this road money by action? That seems to be the question; for if it would, then the county council may now do the same thing. The 31st clause of chap. 81 (10th and 31st heads) makes the improvement of purely internal township roads the care and duty of the township councils. The county councils have now nothing to do with that matter, though the district councils had it entirely under their charge, there being before this no township councils.

By the 32nd clause of the same act, the county council is made a corporation for such purposes only as the inhabitants at large are concerned in, and they are only authorised to hold real and personal property *for the use of the inhabitants of the county in their corporate capacity*. Strictly speaking, therefore, they could only hold any money for the use of the county generally, whereas this money belongs to the township, having been granted for the improvement of the roads. If it had remained undrawn in the hands of the district treasurer, he ought to pay it over to the township council. And it may be asked, therefore, why the county council, now substituted for the district council, should not be allowed by action to call it in and pay it over to the township council? The answer to that is, that if it can be got at once into the right hands, that is the more proper course. The county council might take a different view of their obligations as to applying it, or might not properly apply it; and besides, as the capacity of corporations to be trustees for others has been a good deal questioned, it is at least better that they should not unnecessarily be made trustees; and the necessity does not seem to exist in this case for their stepping in between the township council and these defendants, in order to collect money which they would have to pay over to the township council as soon as they received it; for the fair construction of 175th clause of the statute

seems to take in such a case, and to enable the township council to sue for a debt which before was due to the district council, when that debt is due to the locality, (or which is the same thing when the money belongs to it,) which the township council is now competent to act for. The 176th clause seems to support this construction. The county council is not a body merely substituted for the district council, with the same powers and objects. It has different powers and objects, and exists for different purposes. As to the right to possess, and therefore to sue for this money, and to expend it, the township council now comes in place of the district council: and may sustain an action for money due to the inhabitants of the township, which this money now is.

The rule therefore, we think, must be made absolute for a non-suit.

As to the objections that the by-law was invalid, and that the money should not have been paid to the defendants—we do not determine against the right of action on those grounds. The defendants could clearly not retain the monies in their own hands on any such pretences as those; they have recognized the legal right to intrust the money to them, and they must of course account for it.

Per Cur.—Rule absolute for a non-suit.

DENNIS V. HUGHES ET AL.

Trespass—Pleading—Justification—12 *Vic., ch.* 81—12 & 14 *Vic., ch.* 64 —*Demurrer.*

Trespass, *quare clausum fregit.*

The defendants justified under a by-law passed by the Municipal Council of the township of King, under the authority of which they alleged that they entered for the purpose of opening a new road laid out on the plaintiff's land.

The 3rd and 4th pleas, which are set out in substance in the statement of the case below, were demurred to—among other causes:

Because the Municipal Council had no power to establish and confirm a public road or highway.

Because the plea did not aver any notice by the said corporation before making the said by-law, as required by the statute.

Because the plea did not aver the laying out of the said road by a road surveryor, nor sufficiently describe the said road, where it ran or at what point it commenced, and where it terminated; and because there is no averment that any by-law was made under which the said R. W. assumed to survey, lay out, &c.

Because the plea did not aver that the said road did not run through any garden, &c., of the plaintiff, and for want of averment of consent of owner in writing.

And because there is no averment of a reasonable time having been allowed plaintiff to open the said road, after the passing of the said by-law, before the defendants committed the said trespasses.

Held per Cur., that the municipal corporation had power *to open new roads* through any person's lands, *under the restrictions in the statute.*

Held also, that no notice of such road was necessary, the word *opening* being omitted in 12 Vic., ch. 71, sec. 192, and that 13 & 14 Vic., ch. 64, could not apply to this by-law.

Held also, that the plea was bad in not directly averring that the surveyor had laid out a road through the plaintiff's land, which he reported on 27th July, and that such road went through and over the *locus in quo*, and that the council confirmed that road.

And Semble, that it would not be sufficient for a surveyor to lay out a road through a man's land of his own accord, and then to report it to the council, to entitle the council to establish it as a road, but that the surveyor must first act in consequence of a proper application or order.

Semble also, that a by-law cannot be good which authorizes a road through a man's land without stating where it enters or what course it takes; and that the reference to the surveyor's report, without annexing it to the by-law, is not sufficient.

Semble also, that the *plea* should have averred that the road was so laid out as not to run through or encroach upon any dwelling-house, &c., though it is not necessary that this should appear on the face of the by-law.

Semble also, that the mere passing of a by-law should not be considered as *ipso facto* the opening of a road, but merely as authority to open it in a proper manner, and after reasonable time given to all parties.

That the plea is defective for neither stating that this was a wholly new road, nor (supposing it not to be so) that notice was given as would then be requisite

But *Quære*, whether averment of notice would be necessary in any case.

Held also, that the by-law was bad for referring proprietors to private parties for compensation, which they had no power to do—and because it directs a passage under the road to be made by parties whom they have no means of compelling to do so.

Held also, that a party is not necessarily restrained by 155th sec. from bringing an action till the by-law has been quashed—for some of the objections would prevail, even though the by-law were perfectly legal.

(Q. B., E. T., 15 Vic.)

Declaration: Trespass, *quare clausum fregit*.

Plea:—That after the statute 12 Vic., ch. 81, was passed and came into force, a corporate body was framed under and by virtue of that statute, called the Municipality of the Township of King, with power to open, alter and repair highways, roads, &c., (quoting the words of the statute which gave that power); that on the 29th day of July, 1850, they made a by-law, which is as follows:—

"A BY-LAW, No. 20,

"*To open a road north of Brownville, through lot number thirty-five in the ninth concession of the township of King.*

1st. Be it enacted, by the Municipality of the township of King, and it is hereby enacted by the authority of the same, that the line of road surveyed and laid out by Robert Walsh, a road surveyor, as reported to the township council by his report, bearing date the twenty-seventh day of July, 1850, through lot number thirty-five in the ninth concession of the township of King aforesaid, be, and the same is hereby established and confirmed as a public road or highway, three rods wide.

"2nd. And be it further enacted by the authority aforessid, that the petitioners for surveying the said road shall pay the surveyor his legal charge for surveying the same.

"3rd. And be it further enacted by the authority aforesaid, that the petitioners shall pay all damages, if any, to be awarded by the arbitrators to be chosen for that purpose.

"4th. And be it further enacted, that the petitioners for the said road shall, within one month from the passing of this by-law, make or cause to be made a good and sufficient passway under said road, in such a plan and manner that horned cattle of any size may freely pass to and from the waters west of said road; and further, that the said bridge or passway shall be kept in good repair by the statute labor in the division to which said road belongs."

That the said by-law being so made, "the defendant, on 30th July, 1850, being the said time when, &c., as the servants and by the command of the said municipality, and of the overseers of highways in and for the said township, duly appointed as by law required by the said municipality, under their corporate seal, they, the said defendants, being resident inhabitants of the said township, did at the said time when, &c., under the authority of the said by-law and acting in execution thereof, proceed to open and establish, and did then open the said highway, by said by-law directed, through the said lot number thirty-five in the ninth concession of the township of King, being the lot in said by-law mentioned, and being the close of the plaintiff, in which, &c., in the declaration mentioned, as directed by the said by-law, and as the same had been surveyed and laid out by said surveyor, as in the said by-law mentioned; and in so doing, in opening the said highway did necessarily, for the carrying in to effect and executing the said by-law, break and enter the said close in which, &c., the fences thereof across said road so ordered to be opened being kept shut and closed by this plaintiff:" and the plea proceeded to justify the prostrating and removing the fences, and the other injuries complained of, as being acts necessary to be done under such command as aforesaid, and for carrying into execution the said by-law, &c.

The fourth plea was in substance the same as the third, not setting out the by-law at length, but only the necessary parts of it, and alleging that the defendants being resident inhabitants of the township, as the servants and agents and by the command of the municipality, and under and acting in the execution of the said by-law, did open the said highway, &c., not stating any command from the overseer of highways."

Demurrer to third and fourth pleas, on the grounds mentioned above in the digest.

Cameron, Q. C., and *Connor, Q. C.*, for the demurrer. *Hagarty, Q. C.*, contra. The several acts and claims mentioned in the judgment were referred to in the argument. Cases cited—1 Tyr. 480; 6 Nev. & Man. 736; 9 Q. B. R. 1,005; 9 M. & W. 736; 1 Exch. 837; 1 M. & W. 628; 16 M. & W. 77; 15 M. & W. 357.

ROBINSON, C. J., delivered the judgment of the court.

This demurrer brings up questions which are rather important, on account of their affecting proceedings under a statute which is constantly being acted upon by municipal bodies, sometimes perhaps without due consideration of the care necessary to be observed. We have no discretion to act in opposition to established principles; and if we had, we might not find it easy to determine whether such a statute as the one in question should, as to the application of its powers, be construed liberally or strictly.

On the other hand, it is to be considered that the legislature have thought fit to commit very extensive legislative powers to municipal bodies to be formed in townships, some of them very remote. These bodies are to be composed of such members as the inhabitants can choose, and will choose; and there can be little doubt that in these township councils so constituted, laws will be sometimes made by persons who have had the least possible experience in framing statutes. If their acts are to be treated with a particularity at all resembling what the law exacts for the protection of liberty an property—when these men are to be affected by the acts of magistrates, and in some other instances—it may happen that in many cases their by-laws for laying out roads under this statute may be held to be invalid, and great inconveniences might happen to those who have been acting under their authority.

On the other hand, there is a good deal due to the individuals whose rights as proprietors are liable to be interfered with in a manner which may prove very injurious and vexatious if the municipal bodies are not held to a reasonable degree of regularity in their proceedings under the statute now in question. The plea in this case is founded upon a by-law passed by the municipal council of the township of King, under the authority of which it is alleged the defendants entered for the purpose of opening a new road laid out on the plaintiff's land.

Whether these pleas are sufficient or not in substance, depends on the effect of the statute 12 Vic., ch. 81. The 155th, 188th, 189th, 190th. 192nd, 195th, 198th clauses are all that appear to me to bear in any degree upon the case; and it is necessary also to refer to 13 & 14 Vic., ch. 64, at No. 34 in the left hand column of the schedule A., which relates to the amendment of the 192d cl. of 12 Vic., ch. 81.

It was said in the argument that the principal point of the case was whether the township councils had power under the 31st clause of 12 Vic., ch. 81, to lay out new roads through the lands of individuals—that is, roads for affording means of passing from one point to another, between which there had been no public road before.

It was contended that the councils have authority only to change the direction of existing roads, and to widen or otherwise alter them—not to make new roads; but it is clear that the councils have power given by the act to make new roads through any person's land, not merely as substitutes for other roads running near and between the same points, but to afford a passage from one point to another when there was none before. We are clear in that opinion; but they must keep within the restriction in the 10th head of the 31st clause—"Provided always, nevertheless, that no such new highway, road, &c., shall be laid out so as to run through or encroach upon any dwelling-house, barn, stable or out-house, or any orchard, garden, yard or pleasure ground, without the the consent in writing of the owner thereof."

Then it is objected that this plea is bad, because it does not shew that notice was given of the application for the road, as the 192nd clause requires. We think there is nothing in that objection. That clause only required notice to be given of any law "for stopping up, altering, widening or diverting a road, &c."

This by-law was for neither of those purposes. The legislature, no doubt, must have intended to make notice necessary when the application was for a new road, but the act plainly applies to the other cases only, and omits that, and we cannot supply the omission. It has been remedied by the act 13 & 14 Vic., ch. 64, No. 34 of schedule A., which introduces expressly the word "opening," into the 192nd clause of the former act, and provides in effect that that clause shall thenceforth be read as if the word "opening" had been originally in that clause; but the legislature in giving that retrospective effect to their amendment, by the first clause of the 13 & 14 Vic., ch. 64, were careful to provide in the same clause that such amendment should not in any way affect anything done under the former act, but the same—unless it shall have been made the subject of proceedings at law actually instituted before the passing of the latter act—should be thereby ratified and confirmed.

The first statute was passed on the 30th May, 1849; this by-law passed on the 27th July, 1850, under its authority only, and at a time when no notice of a by-law for such a purpose was necessary under the 192d clause; and it would be contrary to the saving in the first clause of the latter act, which was passed *on the 10th August*, 1850, if anything which was legally done under the first act before the second act passed should be rendered illegal by the latter. This action was not brought before the 10th August, 1850; and therefore, whatever may have been meant by the exception contained in the last three lines of the first clause of 13 & 14 Vic., ch. 64, that exception cannot affect the question

in this case; so that we are clear that the plea is not bad for want of averring notice—even if that would in any case form a necessary part of the defendant's plea—for no notice in this case was necessary. But though we think the plea not bad on either of those two grounds, there are other objections which we think are entitled to prevail.

I have had some doubt on the point whether the plea should not have averred that the new road authorized by the by-law *was not so laid out as* "to run through or encroach upon any dwelling-house, &c., or any orchard, garden, yard or pleasure ground," though on the argument the objection was not much pressed.

The plea founds the defendants' justification on an act interfering with private rights of property, and very materially, for it authorizes the land of individuals to be taken from them without their consent, but only in certain cases. All such acts are to be taken strictly, and the persons justifying under their provisions must shew themselves to be right *in omnibus*.

The proviso here is not an exception contained in another clause of this statute; it is part of the same clause which gives the power, and seems to be even part of the same sentence. We do not read in the 31st clause (10th head), that the councils have power to make a by-law for the opening of a new road through any private property, but only for the opening of any new road—provided that no such road shall be laid out so as to run through or encroach upon any house, garden, &c.

The by-law, I am satisfied, need not state on the face of it that the road authorized does not run through or encroach upon any house, garden, &c.; and that was not the exception taken, but that the plea should have averred whatever was necessary to make the by-law valid. I think this a case in which the principle of the necessity of negativing provisoes or exceptions in a plea does apply—though there is room for doubt on the question. I refer to 1 Saunders, 72 note 262—note (*a*); 1 Ld. Ray. 120; Plowden, 373, 410; 7 T. R. 27; 2 Chy's. Com. Law 283-4-5; 3 B. & C. 189; 12 M. & W. 89. Looking at what is said by Holroyd and Bayley, judges, in *Wells* v. *Iggolden*, 3 B. & C. 188-9, and comparing the statute which they were discussing (55 Geo. III., ch. 137, sec. 6) and the object of the proviso then in question, and how it stood in the clause, with reference to the enacting part, with the state of the question in the present case—it appears to me that the same judges who decided the objection in that case not to be tenable would have held it fatal here; and what distinguishes this case from *Thibault* v. *Gibson*, 13 M. & W. 89, which may be thought to bear against this

exception, and other cases of that kind, is, that this statute is one conferring a power restricted within certain limits; and where any one has occasion to rely upon the legal execution of that power, he must shew that the act done under it was within it.

Then it seems to me that the plea is bad also in not having directly averred that the surveyor Walsh had not surveyed a certain line of road, describing it so that its position would appear, and so that it could be seen whether it could apply to the trespass complained of. The by-law does no more than "establish and confirm as a public road three rods wide the line of road surveyed and laid out by Robert Walsh, a surveyor, as reported by him in a report dated 27th July, 1850." The plea should at least have averred as a fact that Walsh did lay out a road through the plaintiff's land, which he reported on 27th July, 1850; that the road he so laid out and reported went through and over the *locus in quo;* and that the council, by their by-law, confirmed that road. As the plea stands there is really nothing directly stated and described to which the by-law can be applied. The incidental reference to it in the latter part of the plea—where it is said that the defendants opened the road as *the same* had been laid out by Walsh, &c.—does not supply the defect, because that has no reference to the by-law, but to the acts of the defendant; and it is argumentative only, not an express averment. If the plea had averred the laying out of a certain road by Walsh as a fact antecedent to a by-law, there would still have remained the question whether it is enough to say that a road surveyor going, for all that is stated, without any application or order from any one, and laying out a line of road through a man's land, of his own accord, and reporting it to the council, entitles the council to establish that as a road. I apprehend it does not, but that the intention and effect of the act is that the surveyor should be first set in motion, in consequence of a proper application or order—otherwise, the road surveyors of a township might, according to their own fancy, set the council legislating upon as many roads through people's farms as they pleased, whether the inhabitants of the township or the council desired such roads or not.

Another important consideration is, whether a by-law can be good which authorises a road three rods wide through a man's land, but does not state where it is to enter his land, or what course it is to take through it; so that no one looking at the by-law can see whether it is such a road as the council had power to lay out, nor for what amount of injury he could claim compensation. Is the reference to the surveyor's report sufficient without annexing it to the by-law, or even averring it to be among the records or archives of the council? I apprehend not,

though it admits of question; and there is indeed, after all, what I take to be a clear defect in this respect, referring to the exception of want of notice, that for all that appears either in the by-law or the plea we are not warranted in inferring that this was a new road which the surveyor had laid out, and not a road merely altering or deviating from a former road. It is nowhere said that the object of the by-law was to open a new road, and we cannot judicially intend it. It may, for anything that is stated, as well have been a road deviating from a concession or side line or some other pre-existing road near it, leading between the same points, and merely passing through a part of the defendant's land to avoid bad ground, or to shorten the distance. In such a case it would be a diversion or alteration, and would require a previous notice to make it legal, under the first statute. The plea neither shews that notice was given, nor does it shew certainly that it was a wholly new road, and that on that account no notice was necessary. In that respect an objection may be connected with the question of notice—not because (taking it to be a new road) notice was necessary, but because it stands uncertain on the record whether it was a new road or an alteration of another road; but it would still be necessary to consider if this were the only exception, whether these defendants are bound to aver notice in any case. We think the by-law bad also, inasmuch as it refers the proprietor for compensation to private parties, whom neither the council nor he can compel to make compensation; and it directs a passage under the road to be made by others, in order to remove an inconvenience which their road would impose upon the proprietor, while there no means of compelling others to do what the by-law enjoins. Indeed, these provisons in the by-law seem to afford evidence that it was no adequate public object or motive which led to the establishment of this road, but that the council were rather passively submitting to the desire of certain private parties, to whom they were willing to grant the facility of going through their neighbour's grounds, if they would pay for it, and not otherwise. But the council have no power to enforce payment in that manner; and the question is, whether their by-law should stand, when it imposes an inconvenience for which they acknowledge there may be a claim for compensation, and refers the proprietor for that compensation to the funds of private parties, over which they have no control. We apprehend this to be a decisive objection to the by-law, on the same principle that applies to awards between parties—that when a thing is ordered on one side which the arbitrators have no power to order, and it appears that this was the consideration of what has been awarded on the other side, the award must fail altogether.

There are other questions which present themselves on this demurrer; such as, whether if this by-law were perfectly and regularly passed, the council or any one by their order can go the moment it is passed and open the road, treating the fences standing across it—though necessary for the protection of crops already in the ground—as illegal obstructions of an existing highway, which they have a right instantly and without notice to remove. It would seem but reasonable that the owner of the land should have a certain time allowed him after notice to protect his fields, before his fences should be thrown down; and the mere passing of a by-law establishing a road, should not be considered as *ipso facto* the opening of a road, but merely as authority to open it in a proper manner.

It would be well if the interests of proprietors in this respect were guarded by some express provisions. In the meantime, I do not consider that the road is made when the by-law is passed, but only that it is authorised to be made by the proper officer acting in a reasonable manner.

On the whole, it is our opinion that the pleas can neither of them be sustained. It has been strongly urged that so long as the by-law has not been set aside—as it may be, if illegal—it must certainly afford to any one acting under it a legal justification, even although it be bad upon the face of it; and that in this case, by reason of the 155th clause of the statute, the principle cannot apply that no one can rely on an authority invalid in itself, and not merely irregular by reason of extrinsic circumstances.

I feel that some rather embarrassing questions may arise under the 155th clause. It is so expressed as to lead strongly, I think, to the conclusion that this court was to entertain such objections only as might be raised upon the contents of the by-law, and not objections by reason of some alleged irregularity in the passing of it. But, if the legislature so intended, it is not likely that they would, upon reflection, deprive parties of all recompense by action, unless the by-law should be first quashed. However, some of these objections, which we think entitled to prevail, are objections of such a nature that the person injured could not be considered as restrained under the 155th clause from bringing any action till the by-law had been quashed—for they are such that if the by-law were valid, and while it stands, they yet go to shew that it afforded no certain warrant for opening a road over the *locus in quo*, but merely established as a road some line that it is declared a surveyor had laid out, without stating what that line was; while the plea itself does not supply the defect by averring that before the by-law the surveyor

had laid out a certain a certain road over the *locus in quo*, and that it was this road which the by-law confirmed.

Per Cur.—Judgment for the plaintiff.

VAUGHAN v. ROSS.

Note—Notice of non-payment—Insufficiency of affidavit—Extracts of letter not noticed.

G. Ross endorsed a note in blank. His agent being asked by plaintiff's agent where he, G. R., resided, gave an erroneous direction, which plaintiff's agent wrote in pencil under the endorser's name. Notice of non-payment was sent to endorser at such supposed place of residence, and *held* that such notice was sufficient.

Extracts of a letter, embodied in an affidavit, cannot be noticed; either the whole letter or a copy should be before the court, or at least it should be sworn that the letter contains nothing more relating to the action.

In moving for a new trial an affidavit by one of two defendants that he never was served with process or other paper in the cause, nor did any such writ or paper ever come to his knowledge—that he never directly or indirectly retained, employed or authorized the attorney who appeared for both defendants to do so—is not sufficient. He should also have denied knowledge that such a suit was going on.

(Q. B., E. T., 15 Vic.)

Assumpsit on promissory note, made the 25th of November, 1849, by Roderick Ross, payable to George Ross or order, and endorsed to the plaintiff for 21*l.* 3*s.*

Pleas by Roderick Ross, that the note was made on a Sunday and was void.

By George Ross, that the note endorsed on a Sunday and was void, and denying notice of non-payment.

The pleas which set up as a defence that the note was made and endorsed on a Sunday were demurred to.

At the trial it was proved that the note when due was lying at the agency of the Montreal Bank in Kingston, and not being paid, a clerk of the Bank sent notice to the endorser, George Ross, addressed to him at Pembroke, in the county of Renfrew, in the district of Dalhousie, and that he so addressed it because "Pembroke" was marked on the back of the note.

Then another witness, James A. Henderson, Esq., was called, who proved that the defendant, Roderick Ross, being in custody on the limits at the suit of the plaintiff, offered to the witness, as agent of the plaintiff, to give him notes endorsed by his brother, the other defendant. The witness consented, and one McIntosh, a friend of Roderick Ross, brought this note in consequence to the witness, who asked him where George

Ross lived, and being told by him in "Pembroke," the witness wrote that direction in pencil on the back of the note. George Ross was and is a postmaster in Renfrew.

It was objected at the trial that the notice was not directed to George Ross at the proper place, which it seems to have been understood at the trial was at Renfrew, a village 50 miles distant from Pembroke.

The learned judge (Sullivan) held that the note was not delivered till McIntosh, the agent of the maker, brought it to Henderson, and that the endorsement was not perfected till then; that the agent of the maker was, therefore, also in this transaction the agent of the endorser, and he gave "Pembroke" as the place at which the endorser was to be notified. He considered also that there being no evidence that Pembroke was not the nearest post-office to Renfrew, it should be assumed from the conduct of the agent who brought the note, that it was the nearest.

The jury gave their verdict for the plaintiff, 21*l.* 15*s.* 6*d.*

The defendant George Ross, by *Gildersleeve*, moved for a new trial on the ground of misdirection and reception of improper evidence; he cited 4 B. & C. 825; 2 P. & D. 288; 3 C. & P. 179. *Henderson* shewed cause; he cited 7 M & W. 102; 1 Dowl. N. S. 220; 7 Bing. 563.

ROBINSON, C. J., delivered the judgment of the court.

I see no pretence for complaining that there was any illegal evidence received. The witness, Henderson, proved as a fact that he took down from the mouth of McIntosh, who brought the note intended for discount, the place of residence of the endorser, George Ross, and wrote it on the back of the note, in order, no doubt, that when it should come to maturity the Bank might know how to direct their notice, in case of non-payment. Henderson was competent to prove that fact, and the only question that arises is, whether the Bank can be held to have used diligence—in other words, whether they were safe in adopting the place so stated as the proper place to send the notice to? If so, then it is not material whether the notice so directed did actually reach the endorser in time or not, nor whether the place which they assumed in good faith upon such authority to be the residence of the endorser was in truth his place of residence.

It is admitted that George Ross resided at a village called Renfrew, about 40 or 50 miles from Pembroke; that he was postmaster at Renfrew, and that there was and is a post-office also at Pembroke.

But admitting that Pembroke was not the proper address, we are still to consider whether the Bank was not safe in addressing their

notice according to the information brought to them by the person who took the note to them for discount, for the benefit of Roderick Ross, the brother of the endorser George Ross. I find nothing expressly to the point in English authorities. Mr. Story, in his treatises on promissory notes, secs. 344, 347, refers to several American decisions, which would seem fully to apply and to sustain the view taken by the learned judge who tried this case in upholding the sufficiency of the notice.

It appears to me a very reasonable view to take of such a case. The person who took the note endorsed by George Ross in blank to the creditor of Roderick Ross, his brother, to leave it with him in order to its being discounted for the benefit of Roderick, to pay his debts, would naturally be asked who the indorser was, and where he lived, for it was on his credit chiefly that the note would be accepted under the circumstances. We have no ground for imputing to the agent or messenger any intention to mislead; the endorser had not taken the precaution of adding to his signature any place as his residence or place of business, where he might be notified; and it seems to me to be consistent with good sense to hold, that in such a case the Bank which discounted the note did enough, when they promptly sent notice of non-payment to the endorser, addressed to him at that place which they found marked on the note as his residence, and when the information which they thus received and acted upon was derived, as it turns out to have been in this case, from the person who brought the note from the maker. It seems to resolve itself into this question, whether Henderson's asking McIntosh, who brought the note where the endorser lived, was a reasonable inquiry, so that it would have been safe for him, if he had retained the note, to rely upon the information received in answer to it. In the absence of any authority to the contrary I am content so to consider it.

Then Roderick Ross has moved for a new trial on an affidavit sitting forth that he never was served with process or other paper in this case, "*nor did any such writ or paper ever come to his knowledge;*" that he never directly or indirectly retained, employed or authorized Mr. Billings (who pleaded as his attorney), or any other attorney, to file any appearance for him; that it was only on the 18th November that he learned Billings had appeared for him, and that a verdict had been obtained against him at Kingston at the assizes (in October). He does not make any allegation of having merits, or any defence to offer.

The plea on the record put in by Mr. Billings, the attorney for him, was, that the note sued on was made by him on Sunday and is void. It being suggested last term that he should have shewn the attorney who entered the appearance for him to be insolvent, so that he could

have no indemnity from him, he asked leave to file an affidavit to that effect, which was granted, and on the 11th December he filed one made by himself, that he has been informed and believes that Billings is in embarrassed circumstances, and that he could not recover anything from him in the event of his (the defendant's) being compelled to pay the verdict. At the trial no defence was set up except on account of the endorser George Ross. In answer, affidavits are filed, but none from Mr. Billings, accounting for his having appeared for both defendants. It is shewn that he did enter appearance for both defendants on 24th July, 1850, and filed pleas on 23rd September following.

The plaintiff's attorney swears that having had a copy of the demurrer served on George Ross, he was about to send a copy for service on Roderick Ross also, but hearing that appearance had just been entered for both defendants, he thought it would be an unnecessary expense to the defendant, and did not send it.

An affidavit is also put in made by Mr. Smith, partner of the plaintiff's attorney, stating that after the trial he wrote to the defendant Roderick Ross, informing him of this verdict, being rendered against him, and received an answer in which he says, "I saw you were determined not to give me any chance, but to put me to all the costs you could, and therefore felt perfectly justified in trying to defeat you, as any other person would." This affidavit states also that in the same letter Roderick Ross made particular propositions for settling the note now sued on, which are set forth; but the letter itself is not produced nor a copy of it, nor its non-production accounted for. He swears that this note was one of three notes into which the debt was divided, for which the plaintiff had execution against Roderick Ross, and had him on the limits, and that as a matter of indulgence, the plaintiff agreed to give him his liberty on his furnishing these notes; the first of which has been paid, and this is the second.

Why Mr. Smith should not have annexed Mr. Ross' letter or a copy of it is not explained; probably because it contains matter not intended to be made public; but of course we cannot notice the extracts sent, because the whole letter or a copy should be before us, or at least it should be sworn that the letter does not contain anything more relating to this action or the notes, than has been stated in the affidavit. We are of opinion, however, that although the production of such a letter would have put an end to all ground for interfering, we may nevertheless on other grounds, as the case stands, decline to make the rule absolute.

The defendant gives no intimation of any ground of defence; the

note, it is not denied, was given on George Ross' account and to relieve him from imprisonment on account of a debt for which this plaintiff actually had judgment; and considering that he has paid one of the three notes, into which the sum was divided, all made at the same time, we cannot shut our eyes to the fact, that he is endeavouring to baffle and harrass the plaintiff, contrary to all reason and justice. He may well, therefore, be held to the greatest strictness in his application on the ground of irregularity, which appears so little entitled to favour; and we think he ought to have denied in his affidavit not merely knowledge of any writ, *or other paper in the cause*, but knowledge that such a suit was going on; for the plaintiff, when he found that an attorney had appeared and pleaded for both, might well imagine that the attorney had received from one of them instructions to defend for both, and the defendant does not swear that that was not the case. The case of *Holmes* v. *Russel* (9 Dowl. 487), is a strong authority against this application.

Per Cur.—Rule discharged.

TURLEY v. GRAFTON ROAD COMPANY.

10 & 11 Vic., ch. 93—Departure from terms of contract—Action on common counts—Time for payment—Objections not duly taken at trial cannot be urged in term.

The Grafton Road Company have power, under 10 & 11 Vic., ch. 93, sec. 35, to make contracts by parol.

Where the terms of a sealed contract have been so far departed from as to put it out of the power of the contractor to sue upon it, he will not be precluded, after his employers have accepted the work, from bringing his action for the value of the work done.

Although where a plaintiff by his own act has put it out of his power to sue on a contract he cannot insist on prompt payment in an action on the common counts, yet, where the objection that the time for exacting the last payment under the contract had not arrived when the writ in the cause was sued out was not made when the plaintiff closed his case, but merely by way of objection to an observation made by the learned judge when charging the jury, the court will not admit the objection to be urged in term on a motion for a new trial.

Semble, That a recovery in an action on the common counts for work and labor, or for any part of the value of the work, would be taken to preclude any other action for the same work.

(Q. B., T. T., 14 Vic.)

The declaration in this case was upon the common counts, for work and labor and materials provided, for goods sold and delivered, money paid, and the account stated; to which the defendants pleaded non assumpsit and payment in full.

At the trial at the last assizes held at Cobourg, (before Burns, J.), the facts appeared to be these: The plaintiff and the defendants, by indenture dated the 2nd January, 1849, executed by both parties,

entered into a contract by which the plaintiff undertook to grade, grub, ditch, drain, construct and complete a certain portion of the Cobourg and Grafton Road, according to certain specifications annexed to the contract, and to complete the same by the 29th September, 1849, and by the contract the defendants undertook to pay the plaintiff as follows: one-third of the sum total to be paid monthly as the work proceeded, on presenting the engineer's certificate for the same, and the remaining two-thirds in three equal payments, with interest, in six, nine and fifteen months from the completion of the contract, and its being certified by the engineer.

The contract contained many conditions and stipulations, among which, as affecting the present action, were these—that if any change or alteration, either in the position or details of any of the work, should be required by the defendants during the progress thereof, then the plaintiff should make such alterations or change; and if such alteration or change should entail extra expense on the plaintiff, either in labour or materials, the same should be allowed him by the defendants; or, should it be a saving to the plaintiff in either labour or materials, then the amount should be deducted from the contract; that the plaintiff should not in any way dispose of, sub-let or re-let any portion of the work, except the procuring of materials, without the sanction of the engineer.

During the progress of the work an arrangement was made, at the request of the plaintiff, that one Doyle should complete the sixth section of the work, and an arrangement was made between Doyle and the governor of the company, that he Doyle should complete that section, and the plaintiff should be entirely relieved from it, and Doyle should do it and be paid by the defendants, and the plaintiff should have nothing more to do with that part of the work. The plaintiff completed the remainder of his contract by the 31st August, 1849, and the engineer of the road on that day certified that the plaintiff's work amounted to the sum of 1300*l.* 12*s.* 2*d.* There was no contest between the parties in respect of the time in which the plaintiff did his work, but the defendants contended the work was not done according to the contract and specifications. Doyle went on with the sixth section, and worked at it for two months in the fall of 1849, till in the month of November he was stopped by the frost, and did not complete that part road till the following spiring. The defendants, about Christmas 1849, erected a toll-gate and received toll for the whole road, though it was not gravelled till about ten months after the plaintiff left it, and before it was gravelled the defendants caused a great part of it to be regraded.

The contest at the trial was chiefly with respect to whom the expense of this, amounting to some 200*l.* to 250*l.*, should be chargeable, and also as to the proper construction of the road in other respects.

The defendants contend that the expense they incurred was occasioned by the fault of the plaintiff in the first instance, and the plaintiff contended that the wear and tear of the road for a period of some nine or ten months after he left it, together with the action of the winter's frosts and spring freshets without the metal being laid, had rendered it necessary for the defendants to do what they did, and that he had substantially completed the contract.

At the trial the defendants contended the plaintiff's action on the common count for work and labour failed, because the company could only contract by deed under seal; and secondly, there being a sealed contract, the action should have been upon it; that the acceptance by the defendants of Doyle to do a part of the work for them, and relieving the plaintiff from that part, did not destroy the contract so as to let the plaintiff go for a *quantum meruit*, because changes and alterations were provided for, and the contract, as regarded the residue of the work done by the plaintiff, remained intact.

The learned judge reserved leave to the defendants to enter a non-suit on either of these points, and submitted to the jury the question, of how much the plaintiff was entitled to receive, if they found that he did the work according to the meaning and spirit of the contract, and to the satisfaction of the defendants' engineer. He also told the jury that the time of payment mentioned in the contract should not bind, as the action was not on the contract—that is, as to finding a proportionate sum of the balance due in respect of the times of six, nine and fifteen months, mentioned in the contract, but that in this action it was for the jury to consider what the whole work was worth under all the circumstances, of the work done as before mentioned and accepted by the defendants.

The jury found a verdict for plaintiff and damages, 666*l.*, being between 30*l.* and 40*l.* less than the plaintiff claimed.

The defendants, by *Vankoughnet, Q. C.*, obtained a rule to enter a non-suit, pursuant to the leave reserved, for a new trial, the verdict being contrary to law and evidence, and for misdirection.

Cameron, Q. C., shewed cause. Cases cited 4 Taunt 475; 1 Stark. 107; 1 Camp. 190; 4 Bing. 74; 1 U. C. R. 110; 1 Stark. 275.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the statute 10 & 11 Vic., ch. 93, sec. 35, enables the Grafton Road Company to make such a contract as they sue

upon in this action by parol; and if there had been no such provision, I do not consider that, having accepted the road so far as to use it and cover it with gravel and impose toll upon it, they could resist an action as upon an implied understanding to pay what it was worth. (*a*) The law would I think, imply an undertaking, and of course a valid one, to pay for what they had received and were enjoying; otherwise a corporation, when a sealed contract had existed, need only fail in performing some part of ther own agreement, or sanction or acquiesce in some departure from it on the other side, so as to make the special contract no longer binding, and then they could retain whatever advantage they had obtained, and pay nothing.

In the present case we think we cannot hold that the sealed contract under which the work was begun ought to have been sued upon by the plaintiff; for the chief aim of the company was to shew that the plaintiff had not done the work according to it, and was therefore not entitled to sue upon it, and they did shew that to a considerable extent.

The engineer's certificate cannot be treated as conclusive upon the defendants for any purpose; because, in the first place, the agreement did not, as some do, make him the judge on that point, so as to make his opinion binding on the company; and if he did, yet he does not do more than simply give an estimate of the value of the work done. He does not declare the agreement fulfilled, and his evidence shews that he could not have sworn so truly.

The only objection on which we have found reason to hesitate is one which was not taken when the plaintiff had closed his case, but merely by way of objection to an observation made by the learned judge in charging the jury. It was adverted to again in arguing this rule—namely, that the time for exacting the last payment had not arrived when the writ was sued out in this cause. The work was completed before the 1st of September, 1849, and this action was commenced before fifteen months from that time had run out; and so before the last payment must have been made by the defendants, if the agreement had been literally carried out, so as to be still clearly subsisting for all purposes. I take it that if we were right in determining the case of *McMahon* v. *Coffee* (1 U. C. R. 110) as we did, the plaintiff could not insist on prompt payment, contrary to the agreement, merely because he had himself so far come short of his engagement as to lose the advantage of it. *Robson* v. *Godfrey et al.* (1 Stark. 275) appears to sustain that view.

(*a*) See *Blue* v. *Gas and Water Company*, *ante*, p. 182.

But there is really no force in the objection here because the time for paying all had expired long before the trial, and the costs would be the same if the one-third in question were struck out and left to be recovered in another action. The difficulty is, that a recovery in this form of action for any part of the value of the work would be taken, as we apprehend, to preclude any other action for the same work. The question would seem rather to apply to the plaintiff's right when he took out his writ to recover for anything on the common counts; but it was not placed on that ground; and the whole inquiry which was gone into, without objection on both sides, at the trial, shews that it was not intended to push the objection to that extent. We ought not therefore, we think, to admit it now in that shape; and we could not give effect to it as confined to one portion only of the demand.

Per Cur.—We think the rule should be discharged.

In re Brown v. The County of York.

4 & 5 Vic., ch. 10—By-law bad for want of certainty.

Under the authority of 4 & 5 Vic, ch. 10, a by-law was passed by the District Council, 30th June, 1848, establishing as a public road, "The road laid out by J. E. *surveyor*, between, &c., as appears by his report, bearing date, &c.;" but it did not *refer* to the report *as annexed*, neither was the line of road set out, nor the width stated in the by-law.

Held, that the by-law was deficient in necessary certainty, and must therefore be quashed.

(Q. B., T. T., 14 Vic.)

Cameron, Q. C., moved to quash a by-law for opening a road between lots 4 & 5, in the 4th concession of Toronto, east of Hurontario Street, on the ground that it was not legally established, for that the line of road set out in the by-law, nor the width stated.

The by-law was made on the 30th June, 1848. It is provided that the road surveyed and laid out by John Embleton, road surveyor, between lots No. 4 & 5, in the 4th concession west of Hurontario Street, in the township of Toronto, as appeared by his report, bearing date the 26th day of June, 1848, be and the same is thereby established as a public road or highway; and that the petitioners for the road shall pay 2*l.* 10*s.* to such surveyor for surveying and reporting the road.

Hagarty, Q. C., on shewing cause, produced in court the original by-law with a petition annexed to it, dated 12th June, 1848, setting forth the reasons for desiring the road and praying that it should be on the line between 4 & 5, across the concession, and should be three rods wide, taking one half from each of the said lots; and requiring such line to be examined and reported upon.

And there was also annexed to the by-law the plan and report of Mr. Embleton, the surveyor, describing a line of road as petitioned for, making it 50 feet wide—25 on each side of the line dividing the lots 4 & 5. It was sworn that the petition, plea, and report, were all annexed to the by-law at the time it was passed, and were intended to form a part of it, (though not referred to in it as being annexed); and that the form of by-law adopted in the present case, was similiar to that always heretofore adopted by the council for the purpose of opening a new road.

ROBINSON, C. J.—delivered the judgment of the court.

This by-law was made before the present municipal act was passed, under the authority given to the district council by stat. 4 & 5 Vic., ch. 10, secs. 39, 51. That act requires no report or survey of a surveyor, but gives a wide discretion to the councils to lay out such new roads as they should think fit. It does certainly then appear necessary for the safety of the public and the protection of proprietors of land, that powers so extensive should be carefully exercised, and that what they are intended to accomplish should be seen upon the face of them.

This by-law is so far deficient in uncertainty that it does not shew on the face of it how wide this road is to be laid out between lots 4 & 5, nor how it is to be laid out, any further than that it is directed to be laid out between those two lots; and as it is admitted that these lots touch each other, there cannot be space for a road *between them*, which is what the by-law professes to establish. The road could only be made by authorizing a tract of some specific width to be taken off of one or other of the lots, or partly from each. How this is to be done or how wide the road shall be, the by-law does not inform us, otherwise than by saying that it confirms the road laid out by John Embleton the road surveyor, and described in his report of such a date. It does not refer to that report as annexed, and does not therefore establish identity of the report nor give any security for its being forthcoming when required. The by-law may be always found on enquiry, but we are not informed in the by-law that there will be always found annexed to it the same report and survey of which mention is made in it. Such a mode of legislation is most incomplete and unsafe, for no one can tell from this by-law how wide the road is to be nor its precise position. To make the law intelligible, something must be produced, which is not referred to in the by-law as appended to it, and about which therefore a question of identity might always be raised, besides the uncertainty of the report being to be found.

As no report of a survey was necessary under the statute then in force, there is no ground for assurance that any survey that was made will certainly be found among the public archives; and it stands as a provincial statute would do, which should authorize all the duties to be levied which a certain collector by an official letter of such a date had recommended to be imposed, without specifying what they were or referring to the letter as contained in the schedule subjoined to the act. As this matter was managed formerly under the statute 50 Geo. III., ch. 1, the surveyor's report formed a kind of record; it was an indispensable part of the proceeding, the foundation of it in fact, and the justices by the third clause of that act, if they confirmed the report, were to cause it to remain as a record in the office of the clerk of the peace, and a copy to be entered in a book. Their order could never be seen separate from the report—all formed one record.

We have not the least doubt that all by-laws authorizing new roads should, either by reciting the whole description of the road given in the surveyor's report, or by describing it fully, whether they refer to the report or not, make it plain to every one that sees the by-law where the road is to run and how wide it is to be (*a*), and should not leave the information to be gleaned from documents not referred to in it as annexed, and not in fact annexed; documents which may not be found upon search, or which may not be evidently intended to be referred to or may when produced be found inconsistent or defective in themselves, and may in truth be found to report such a road as the council could not lay out—for instance, a road 100 feet wide, or a road through an orchard.

But whether we can properly decide that this by-law is bad for uncertainty, because it does not contain any description of the road, either in the body of it, or by reference to any document declared to be appended to it, is still the question.

Our opinion is that it is deficient in necessary certainty and therefore must be quashed (*b*).

Per Cur.—By-law quashed.

(*a*) *Davison* v. *Gill*, 1 Ea. R. 72. (*b*) *Dennis* v. *Hughes*, supra. 437; Angel on Corp. 357.

THE MUNICIPAL COUNCIL OF LINCOLN, WELLAND AND HALDIMAND v. THOMPSON ET AL., EXECUTORS OF POYNTER.

Pleading—Who proper plaintiff and defendant—12 *Vic., ch.* 78, *secs.* 6, 20, 37; 12 *Vic., ch.* 7, *secs.* 174, 175.

The testator having been appointed by the finance committee of the District Council, to collect the wild land tax: *Held*, that his representatives were liable to the council for money received by their authority, and not paid over.

Where, subsequently to the commencement of this action, one of three united counties had been set off from the other two, *held*, that the Municipal Council of the three united counties were the proper plaintiffs to bring the action.

(Q. B., T. T., 15 Vic.)

Assumpsit on common counts for money had and received.

The declaration stated process to have issued on 11th October, 1850, and contained the common counts for money had and received by Poynter, for the use of the plaintiffs, and for money found to be due and owing from Poynter to the plaintiffs, upon an account stated in his life time, and states a promise in consideration thereof, by defendants, as administrators; and the usual breach.

Pleas: *plene administravit.*

The plaintiffs reply that the testator had lands, which the defendants do not deny, so that the case was undefended.

Damages were assessed at the last assizes held at Niagara (Burns, J.), for 235*l.* 6*s.* 11*d.*, upon the following evidence:—

It appeared that in the latter part of the year 1847 or the beginning of 1848, Poynter was appointed by a committee of the district council, called the finance committee, specially to collect the wild land tax for the different townships in the then district of Niagara, being the united counties of Lincoln, Haldimand and Welland, at the time of the commencement of the action. The duties assigned to him were to collect this tax and pay it out for the purposes of the different townships, as he might be directed. He accounted for no part of the monies to the treasurer of the district, nor was he under his control in any way, but acted under the immediate instructions of the committee who appointed him. If the treasurer, in the absence of Poynter, received any of these taxes, he paid them over to him. It was proved that Poynter kept books of his receipts, and payments of and from this fund, distinct from the treasurer's books; and in the course of the years 1847, 1848 and 1849, he had collected the sum of 1424*l.* 3*s.* 5½*d.* from twenty townships, and during the same period had paid on account of the different townships 594*l.* 5*s.* 8½*d.*; the balance from him still due being 235*l.* 6*s.* 11*d.*; the difference between the sum so paid out by the different townships and the balance still due having been accounted for to the treasurer under the authority of the committee.

It was agreed that the damages should be assessed at the sum claimed, subject to the opinion of the court whether the plaintiffs were entitled to more than nominal damages.

The defendants, by *Vankoughnet*, moved to reduce the assessment of damages to one shilling, or that there should be a new assessment, on the grounds—1st. That though the suit was commenced before Haldimand was set off from the other two counties, yet that when it was set off (which was on the 1st of January, 1851, as the *Gazette* shews) then that county would be entitled to the monies received for the townships within its boundaries, and the record should have suggested the change, and the suit be continued in the names of the other two counties, which would entitle them only to the monies of the townships within their boundaries. 2nd. That since the statute 12 Vic., ch. 81, creating township municipalities, each township should bring an action for the money belonging to it; and that the action in the name of the county council cannot be maintained. 3rd. That Poynter should be looked upon and treated as the subordinate of the treasurer, and not liable to be sued by the treasurer; but that the treasurer is the person liable to the plaintiffs.

Cameron, *Q. C.*, and *Eccles*, contra. They cited 1 B. & P. 398; 12 Vic., ch. 81, secs. 174, 175.

ROBINSON, C. J., delivered the judgment of the court.

We see no good reason why the judgment should not be entered on the verdict as it has been rendered.

The defendants have denied that they are accountable to the plaintiffs for money had and received for them by the testator; and, on the evidence, we think they are accountable. Poynter seems to have received the district taxes in question not as clerk or deputy to the treasurer, but by direction and authority of the council, who are now suing his representatives.

They are not suing a clerk or deputy for misconduct, but are suing for their money, received by their authority and not pay over, and which they can of course follow, and can hold any person accountable for it who received it by their authority.

There would be no difficulty even if there was no special provision on the subject; but the Municipal Council Act meets the case.

Then, as to the present municipal council being the proper plaintiffs to bring the action, we see no difficulty there; they have power to get the money, and we must suppose they will dispose of it according to law. And no objection of this kind appears to have been taken at the trial.

Per Cur.—Rule discharged.

The Queen ex rel. Henry Bartliffe v. James O'Reilly.

The Queen ex rel. Henry Bartliffe v. John Shaw.

Quo warranto—Interest of relator—Qualification for alderman for the town of Kingston—Judgment need not award new election—9 Vic., ch. 75; 12 Vic., ch. 80; 12 Vic., ch. 81; 13 & 14 Vic., ch. 64—Rules of Court Michaelmas term, 1850.

A relator is not necessarily bound to prove his interest, unless the defendant question it by denying it, and shewing, or at least alleging some ground for his denial.

The judge's order is not defective, because it does not award that a new election be held.

Although the statute 9 Vic., ch. 75 has been repealed, yet so long as no new assessment law is passed, the same residence is a necessary qualification for an alderman, as formerly.

(Q. B., T. T., 15 Vic.)

In these cases an application was made to reverse the judgment of Mr. Justice McLean, and that judgment be entered or given for the defendant; or that the writ of summons and all subsequent proceedings be set aside or discharged; or that such part thereof as determines that the defendant had an interest in the election as a voter should be set aside or reversed, and such judgment given as the court shall think fit.

In the second case the application was merely to reverse the judgment, and that the summons originally granted should be discharged.

The elections were for aldermen for Cataraqui Ward, in the city of Kingston, holden on 6th and 7th January, 1851.

The statement filed was in the prescribed form, declaring that the relator had an interest in the said election as a voter and councillor in the said ward, and was duly elected and returned as such councillor at said election.

The ground laid in it, in both cases, was, that the defendant had not been a resident householder within the city of Kingston, or such part of the adjacent county of Frontenac as is distant not more than three miles from the market square of the said City, for four years next before the election.

And at the foot of the statement was the affidavit required by the rule, that the relator believes the ground of objection to the election of the defendant, as mentioned in the foregoing statement, to be well founded.

The summons served on each of the parties stated the complaint to be upon the relation of Henry Bartliffe of the city of Kingston, auctioneer, having, as he said, an interest in the election to the said office, as a voter in the said ward. And on the back of the original summons was endorsed—"The defendant appears to answer the grounds of objection to his election which are stated within.

At the hearing before the learned judge on the return of the summons, it was objected by the defendant's counsel that the interest of the relator as a voter or candidate was not proved but only alleged in his statement. The affidavit made by the relator was confined to the ground of complaint against the election, and did not contain any allegation respecting the relator's interest, and there was no other evidence of it.

The judgment of the learned judge recited that he had heard the parties by their counsel, and he determined and adjudged that the relator had an interest in the election, as a voter; that defendant had usurped the office and should be removed; and that the relator should recover his costs.

Philpotts, for O'Reilly, and *Richards*, for Shaw, obtained a rule *nisi*, on the grounds—

1st. That there was no evidence or proof on oath to warrant the finding that the relator had an interest in the election.

2ndly. That the judgment was defective, in not awarding that a new election was to be held.

3rdly. Because the defendant was in each case duly qualified, at the time of the election, to be chosen as alderman for the ward.

Vankoughnet shewed cause. He contended that the act (*a*) does not require that the relator's affidavit should shew his interest: that the papers were drawn in conformity to the rules of M. T. 1850: that relator need not prove his interest unless required by opposite party (*b*): that residence was a necessary qualification under 9 Vic., ch. 75: that it was not necessary for the judge to direct a new election.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the affidavit at the foot of the statement, and which is in the form prescribed by our rule, does not by reasonable construction involve any assertion that the part of the statement is true which concerns the alleged interest of the relator; and the other affidavit, which applies only to the grounds of objection, having no relation to that point, we cannot say that we find the allegation of interest supported by proof before us. But the particular interest had been declared in the statement, and in the summons served on the party; and when the defendant came in to answer, he put himself upon trial as to the grounds of objection to the election stated in the writ.

The learned judge had determined that sufficient was shewn to

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(*a*) 12 Vic., ch. 81, secs. 146, 7. But see Con. Stat. U. C., c. 54, s. 128.

(*b*) *Queen ex rel. Shaw* v. *McKenzie*, 2 Chamber Reports, p. 86; Cole on Quo Warranto 172; *Rex* v. *Symmons*, 4 T. R. 223; *Rex* v. *Blame*, 4 Ad. & Ell. 666; Reg. Gen. 3 Per. & D. 1.

authorise the summons. When the defendant comes in, he does not deny the interest of the relator but the truth of the objection which he had taken. It is true that the summons in all these cases issues on an *ex parte* statement, but the defendant comes in after being served with that statement; and, being fully aware of the declaration which the relator has made his interest in the election, he takes issues, as it were, on the grounds of objection—not on the relator's right to obtain the summons.

He might have then questioned that, because he had no previous opportunity; but then he should in terms have denied the relator's interest. If he had, we must assume the learned judge would have put the relator to proof, and given him opportunity to prove it. Although the defendant, in one of these cases (O'Reilly's case) tells us that he did, before the learned judge, raise the point that the relator was bound to prove his interest, yet as he had obtained the summons, we should not consider that the learned judge was bound to hold the relator to the necessity of proving it afterwards, unless the defendant brought it in question by denying it, and shewing, or at least alleging some ground for his denial, especially as he had taken issue upon the objections, and and on them only.

The judge has here formally adjudged that the relator had an interest. He may have so adjudged because he saw that the interest being stated to the defendant, it was neither denied nor attempted to be disproved; and, for all we see, it may have stood before him as an undisputed fact, though the defendant may have contended that, in point of form, the proof of the interest must form in all cases an indisputable part of the relator's case, even after the defendant has put himself on trial as to the truth of the objection.

We ought not, I think, to open the proceedings now, as there is nothing whatever to shew that the statement of the relator's interest is not capable of clear and certain proof, though we would recommend that as a point of practice the affidavits filed by the relator should contain proof of the interest alleged.

As to the judgment being defective in not awarding that a new election shall be had: the statute 13 and 14 Vic., ch. 64, (part 23) does not require that, but only provides that in certain cases the judge shall issue his writ for a new election. And by our rules, if the judgment were defective or irregular in this respect, it can be amended by the judge.

As to the main objection on which the election of the defendant, in each of these two cases, was held void—that turns on the effect of 12

Vic., ch. 81, sec. 208; and 13 & 14 Vic., ch. 64, sec. 17; and 9 Vic., ch. 75, sec. 13.

It is our opinion that the effect of these provisions is, that although it is quite true that 9 Vic., ch. 75 has been repealed by 12 Vic., ch. 80. and has no longer any intrinsic force, and cannot itself impose the necessity of an alderman for the city of Kingston having been a resident there for four years next before the election, yet so long as no new assessment law was passed, the effect of 12 Vic., ch. 81, sec. 208, and 13 & 14 Vic., ch. 64, sec. 17, was to make the same residence a requisite qualification for an alderman to be elected for any city which had before been required as a qualification for an alderman to serve for the same city. "All such persons (the act says) as have heretofore had the right to be elected at the annual election for any city heretofore incorporated, shall, until some act be passed repealing the present assessment laws, have the right of being elected for such city."

It is contended (and it may have been so meant and probably it was,) that the legislature intended only to provide by this clause that the former property qualifications should stand so long as the assessment laws remained unaltered; but they have in fact said more; and they in terms made such a provision that any person presenting himself as a candidate must be prepared to shew that he is a person who would, not in one respect only, but in all, have had a right to be elected at a former election for the said city. Could any candidate say this of himself, if he was a person who would in any respect not have been entitled to be elected for the city in question? We think not, and that we should be altering rather than construing the law, if we were to dispense with any of the former requisites. The statute 9 Vic., ch. 75, being now repealed, does not change the condition of things, for that only shews that the qualifications of residence cannot be insisted upon as being required by that act: but what the old act required, while it was in force, is matter of history which the legislature could refer to if they pleased, as having prescribed a qualification which they mean shall be adhered to for a time, and which they so declare by 12 Vic., ch. 81, although the former statute is not in itself an operative law.

And it is reasonable to hold this, because otherwise, in respect to some of the requisites provided for in the 208th clause, the effect might be that no property qualification, or any other qualification, would be required—or a property qualification so small that the legislature would not have been content to let it stand, if it stood alone, and were to be the only thing considered, although when combined with residence they might be willing to let it remain for a time.

Per Cur.—Judgment affirmed with costs.

Hamilton v. Desjardin Canal Company.

Pleading—parties.

Where the directors of an incorporated company misappropriate the funds of the Corporation, a bill against them and the company in respect of such misappropriation, cannot be sustained by some of the stockholders on behalf of all except the directors. The company must be made plaintiffs, whether the acts of the directors are void or only voidable, and the stockholders have a right to make use of the name of the company as plaintiffs in such proceedings.

Where by the act of incorporation the Government is authorised to purchase the corporate estate on payment of its full value, the Attorney General is not a necessary party to a bill by the stockholders against the directors, complaining of the improper conduct on the part of the latter in dealing with the corporate funds.

In such a case, the defendants having answered, admitting certain moneys to have been received by the directors, a motion to pay the amount into court was refused—but the costs of the motion were reserved.

(Chancery, 1849.)

The bill in this case was filed by James Hamilton, the Honourable J. H. Dunn, John O. Hatt and others, stockholders in the Desjardin Canal Company, on behalf of themselves and all others the stockholders, except the defendants, who should come in and contribute to the suit, against John Paterson, James Coleman, Benjamin Overfield, William Dixon, John Gamble, shareholders in the said Company and The Company—and stated the incorporation of the company by statute, (of Upper Canada) 7 Geo. IV., ch. 18—setting forth in detail, several of the clauses thereof relating to the election of officers and their duties, one of them being, that the directors of the company should once in every three years, or oftener if required by the stockholders, at a general meeting, render an exact and particular statement of the affairs of the company. It also appeared by the bill that the canal had been constructed so as to permit of its being used, and that a large sum had been received by the directors for tolls, &c.

The bill then went on to recite the act of 9 Vic., ch. 85, whereby the company was authorised to raise, by way of loan, 25,000*l.*, to be secured on the canal, and the tolls levied thereon; and that the securities given under that act should take precedence of all other claims on the canal; the act also directed that, immediately on effecting such loan, or any part thereof, the directors should pay the amount loaned into one of the chartered banks, to be drawn out by the cheque of the president, countersigned by one of the directors, and by the engineer employed by the company to superintend the works; and that such loan should be applied only to the improvement of the works. And by the third section it was further enacted, that it should be the duty of the president and directors to pay into the bank, at least once a

week, all the tolls or other moneys received for the company, and all moneys then due to or in the hands of the company, and the same was to be drawn out only for the purposes of, or for paying off, some debt due from the company at the time of drawing out the same, and that each cheque should be countersigned by a director, and specify the particular demand it was to be applied in payment of.

That the said sum of 25,000*l.*, or any part thereof, was never raised, but that large sums were obtained from the government of Upper Canada and applied in constructing the canal. That Paterson was elected a director in 1841, and had continued ever since to be president of the company. The bill then alleged that Paterson had alone acted in the affairs of the company, until the election of the other defendants as directors, and had possessed himself of the books, papers and effects of the company; that Coleman was elected a director in 1847, Overfield and Gamble in 1848, and had since continued to be directors, but that Paterson assumed the sole control of the affairs of the company, to the exclusion of the other defendants; that Paterson had received the tolls and other moneys of the company, and had applied them to his own use, or loaned them out, sometimes on security, and sometimes without any security, being given; and had in 1847, [so in brief] with the consent and privity of Coleman, Overfield and Gamble, lent to Dixon 300*l.*, who was then and still is one of the directors; and that, in the same year, Paterson, with the consent and privity of Coleman, Overfield and Dixon, lent 190*l.* to Gamble, and with the consent of the other defendants, had lent 200*l.* to one Spencer; and that Dixon, Gamble and Spencer had respectively executed some pretended security to Paterson for the money so loaned.

That Paterson had refused to render any account of the money or affairs of the company, and that the other defendants encouraged and abetted him in so refusing.

That the plaintiffs had frequently applied to Paterson, Dixon, Coleman, Overfield and Gamble to come to an account with the company, and had also "applied to the Desjardin Canal Company, as well as to insist upon the other defendants accounting with them, and with your orators and others the shareholders, respecting the matters aforesaid, as also to account with your orators respecting the affairs of the company." The bill then charged combination and confederation on the part of the defendants, and proceeded to state,

That Hamilton and Hatt being dissatisfied with the management of the company, submitted three resolutions to the meeting of the stockholders, held on the 3rd of April then last, in pursuance of the act, to the effect,

That the president, &c., of the company should cause to be made out a statement, in detail, of the receipts, &c., of the company:

That a statement should be exhibited of the debts due by and to the company, money in hand, money loaned, if any, to whom loaned, upon what security and for what periods; and

That a general meeting of the stockholders should be called in the month of May then ensuing, for the purpose of laying such statements before them, and devising means for completing the canal.

That upon the resolutions being submitted to the meeting, Paterson, who acted as chairman, undertook on behalf of himself and the other directors, that if the resolutions were withdrawn, the object thereof would be carried out by the president and directors, and that upon the faith of such undertaking of Paterson the resolutions were withdrawn.

That the period for calling the meeting having expired, without anything having been done, Hamilton waited on Paterson and required him to call the meeting, which he declined, unless upon a requisition so to do by a majority of the shareholders, which having been obtained the president and directors called the meeting at Toronto, instead of at Dundas, as required by the requisition, at which meeting Hamilton and Hatt attended, and protested against the same as illegal, and as being contrary to the provisions of the act of parliament, and to the requisition. That the president produced at such meeting a statement of the affairs of the company, to which Hamilton and Hatt objected as being not explicit enough, but grossly incorrect and insufficient.

That Paterson, as president of the company, (and being president of the town council of Dundas,) had lent to the town of Dundas 1000*l.*, of the money of the company, and that for securing the payment thereof, Paterson, as president of the town council, executed to Coleman, also a member of the town council, a mortgage on certain property of the town of Dundas, and the mortgage was witnessed by one Holt, also a member of the town council, and purported to be for securing 1500*l.* and interest.

That for the purpose of making this transaction appear to have been done in good faith, Coleman assigned the mortgage to Paterson, as president of the canal company.

That these transactions are not, nor is either of them, entered in the books of the company.

That the defendants (other than the company) ought to account for all moneys of the company, and to discover and set forth an account thereof, and to whom lent, &c. That Paterson had applied moneys of

he company to his own use, without giving any account thereof; that the other directors threatened and intended to give Paterson some very long time to pay the company the amount due by him.

The bill then prayed an account of all the dealings of the company, and for an injunction restraining the defendants, and each and every of them, from receiving any further toll, rents, &c., of the company, arising the said canal or otherwise, or from interfering with the affairs of the said company, or the conduct or management thereof, *until* the election of some fit and proper person and persons *as the president and directors of the said company*, and that in the mean time a receiver should be appointed, and for further relief.

The defendant Paterson, by his answer, admitted having made loans of the money as stated, but that the same was loaned on each occasion in good faith, and with a view to realize interest on whatever funds might be on hand; denied excluding the other directors from the management of the affairs of the company and refusing to account, and stated that every year, since his appointment, he had caused an annual statement of the affairs of the company to be made; admitted his having undertaken to call the meeting, and his refusal to comply therewith, as stated in the bill; and that he had subsequently called the meeting referred to in the bill at Toronto, as the greatest amount of stock was held by persons residing in and about that city; and that at that meeting the acts of the defendant, and the other directors, were approved of by the majority of the shareholders.

The defendant denied having derived any personal benefit from lending the funds, but that he had made use of 350*l.* of the funds of the company, which he was willing to pay interest upon, and that in the books of the company he was charged with the sum of 2,351*l.*, which included the sum so applied to his own use, and that he had always been ready and willing to give security for all the sums loaned out by him, as well as the sum of 350*l.*, but on offering to the solicitor of the company to give such security he declined, saying that it was unnecessary.

The defendant also stated in his answer, that he had executed a mortgage to government for 12,000*l.* on account of the debt due by the company to the government in respect of this canal, and loaned by government to the company, under the authority of the statutes (of Upper Canada) 1 W. IV., ch. 4; 5 W. IV., ch. 34; 7 W. IV., ch. 65; and to secure which the canal was mortgaged to the government. It appeared by the answer that, since the filing of the bill, a new election of officers had been had, and that Paterson, Overfield, J. B. Ewart, James Smith and the plaintiff Hamilton, were chosen directors, and Paterson was subse-

quently re-elected president; and two schedules were attached to the answer, shewing what securities were held by the company for moneys loaned. And defendant submitted that under such circumstances, it was not competent for the minority of the shareholders of an incorporated company, who are not liable for debt, &c., beyond the stock paid in, to call upon the defendant, under the decree of the court, nor for the court to enjoin him against carrying on the affairs of the company, after having been elected so to do by a majority of the shareholders.

The other directors, and the company also, answered to the same effect.

Upon these answers coming in, a motion was made for an order directing Paterson to pay into court the several sums admitted to have been loaned, and also the sum of 350*l.*, made use of by Paterson, together with interest, &c., or that he might be ordered to pay in 2,351*l.*, the sum charged against him in the books; and that Paterson, and the other directors, should be ordered to pay the costs of the application.

On the motion coming on—*Mr. Adam Wilson* and *Mr. R. J. Turner* for the plaintiffs.—We contend, that as the defendants admit that the sum of 2,351*l.* 15*s.* 3*d.* of the corporation funds has been lent by the president, and has not been called in, but permitted to remain out by the other defendants, jointly with Paterson, while they were directors and had power to call it in; and as they have, while in office, adopted these loans as proper acts; that they are individually responsible for this sum, and that they should be either ordered to bring it into court, or otherwise to appropriate it according to their duty and the statutes.

Several objections, we understand, are to be urged by the other side:

1st. That the Attorney General ought to have been made a party;

2ndly. That the company should have been made plaintiffs instead of defendants;

3rdly. That as the company is carried on by the vote of the majority, we, the minority, cannot be heard to say that they have acted improperly; and

4thly. That the proceeding by mandamus would have been the more proper course.

The several acts mentioned in the statement of the pleadings, were referred to and commented on.

The statute 9 Vic., ch. 95, makes express provision as to how the funds of the company shall be appropriated, namely, deposited in one of banks; and it is under this act, principally, that we proceed; and one main ground for our proceeding is, that we contend that the directors are using the funds of the company in a manner not authorised by the act of incorporation, or by the act of 9 Victoria.

It is alleged by the bill, and admitted by the answer, that Paterson, who is president of the company, had loaned out large sums of the moneys of the company, and that one sum of 350*l.* remained in his hands, and which has been applied to his own use. It is only necessary to read the several statutes relating to this company, to perceive that this is an improper use of the funds. Such conduct is subversive of the whole scope and purport of the act, which is for the construction of a canal, and not to constitute the defendants bankers, in which capacity they would appear to have acted.

Jefferys v. *Gurr*, 2 B. & Adol. 833, was cited to shew, that where persons in the situation of the defendant have paid moneys over wrongfully, they will be ordered to bring them into court, and that they may proceed at law for the recovering back those moneys.

We do not wish the court to distribute the moneys; all that we desire is, that the amount may be brought into court, in order that it may see that the fund is not applied illegally.

It is submitted, that the Attorney General is not a necessary party. The only object in having him here would be, that he might see that the public interests were properly protected; but surely the fact of one or more stockholders coming forward and filing a bill for the proper application of the funds, is quite as sure a mode of having those funds properly applied, as if the Attorney General were here on the part of the public.—*Score* v. *Trinity College, Cambridge*, 3 Ansth. 760. In *Bromley* v. *Smith*, 1 Sim. 8, it is stated that where all parties are to the abuse, in that case the Attorney General must act.

The proceeding here is as much for the benefit of the crown as of the stockholders, therefore the Attorney General is not a necessary party. —*McMahon* v. *Upton*, 2 Sim. 473; *Franco* v. *Franco*, 3 Ves. 75; and *Poor* v. *Clark*, 2 Atk. 516, were cited on this branch of the argument.

As to the second and third objections, the corporation being managed by a majority of the body of directors, and their conduct having been approved of, and their acts affirmed by a majority of the stockholders, the company could only be made defendants. They are wrong-doers, and could not with propriety have been made plaintiffs.—*Mosley* v. *Alston*, 11 Jurist, 315; 1 Phil. 791; *Lord* v. *Copper Miners Company*, 12 Jurist, 1059: *Bagshaw* v. *E. R. R. Company*, 13 Jurist, 602.

The acts of the directors having been illegal, no affirmation of them by the stockholders can give them validity. In *Reston* v. *The Grand Dock Collier Co.*, 11 Sim. 527, the company were unanimous; but afterwards, one only dissented and filed a bill, and such bill was sus-

tained. On these points several cases were cited; amongst them—*Cohen* v. *Wilkinson*, 13 Jurist, 641; *Applerly* v. *Page*, 10 Jurist, 998; *Cooper* v. *Webb*, 11 Jurist, 93, and affirmed on appeal at p. 443; *Walworth* v. *Holt*, 4 M. & C. 619; *Foss* v. *Harbottle*, 2 Hare, 469; *Attorney General* v. *Wilson*, C. & P. 1; *Ex parte Lacey*, 6 Ves. 622; *Ex parte Thawaites*, 1 M. & A. 323.

As to the fourth ground of objection, we submit, the proceeding by mandamus lies only when there is a right in plaintiff, and no legal or equitable means of enforcing it. No case can be shewn where a mandamus has been granted to compel a party to render accounts to the court of common law. No doubt it would lie to compel the payment of money into court; but here, large profits have been made, of those profits we desire to obtain an account; not for the purpose of obtaining a share, but simply for the purpose of having the amount paid in, and applied according to the provisions of the acts of the legislature. To shew the general purposes for which a mandamus issued, reference was made to 6 A. & E. 355; *Rex* v. *Windham*, 1 Cow. 378; *Gray* v. *Chaplin*, 2 S. & S. 267; 13 Jurist, 809; and *Coleman* v. *Eastern Railway Company*, 10 Beav. 1.

On all the facts, as they appear, we admit, that it is shewn that an improper application of the funds has been made; that having shewn this, we are entitled to call upon the defendants to account; that the Attorney General is not a necessary party in any way; that the company must be made parties, and could, under circumstances here appearing, be made defendants only; that as we desire to ascertain what profits have been made, an account is absolutely necessary, and that for that purpose a mandamus would not have been a proper proceeding.

[THE CHANCELLOR.—Do I understand you to contend that the mere fact of lending out the funds of the company remaining in hand, is such an illegal transaction that it will give a party a right to come here to have the money paid into court?]

We submit it is, particularly when it is shown that the loans were made almost entirely to directors of the company; and particularly since the passing of the act 9 Victoria.

Mr. Burns and *Mr. Vankoughnet*, for the defendants, referred to and commented on 7 Geo. IV., ch. 18, secs. 17, 18, 19 & 20, and 7 Wm. IV., ch. 5.

By the several acts, the widest discretion is given to the directors as to how they shall apply the moneys of the company in their hands; and the bill does not allege that any money is required to pay for any repairs, or repaying any loan, or that any inconvenience has arisen, in consequence of the moneys having been loaned as stated.

We submit that the Attorney General should have been made a party: the acts provide for loans to be made by government, and that in the event of mismanagement, the government may take possession of the works, and receive tolls, &c. The Attorney General is clearly interested in the question here raised, for an account is prayed of all tolls, &c., and how the same have been applied. Now the statutes direct, that the tolls shall be first applied to the payment of loans made by goverment, and yet the plaintiffs desire the account of them to be taken in the absence of the Attorney General.

The court, by this bill, is required to suspend the functions of the directors; how then is the court to appoint new directors?

The plaintiffs should have shewn that the money was required for some of the objects pointed out by the statute, if they desire the aid of this court, and even then, we contend, the court would not interfere. If it is contended that the directors have infringed the provisions of that part of the statute directing payment of the debt due to the government—if that were the case, and if the direction of the work is to be changed, then the public would be clearly interested in the result of this cause, therefore the Attorney General is a necessary party.

Here, since the filing of the bill, a new election has taken place, and some of the defendants have been re-elected directors, and Paterson again chosen president.

[THE CHANCELLOR.—If a new election have taken place, and new directors been chosen, does not that remove so much of the prayer of the bill as seeks to restrain the defendants from acting in the management of this corporation, until proper persons have been chosen?]

That may be so, but we submit that the bill, being originally defective on its own statements, and for want of parties, no new facts that are stated in the answer can possibly remedy that defect.

We also contend, that the company should have been here, not as defendants but as plaintiffs; for if the statements in the bill amount to a misapplication of the funds of the company, then it is a case where some of the members of a corporation are wronging the whole body, and the corporation is the proper party to complain of the wrong. A few members of a corporation cannot complain against the corporation; and if the corporation, where some of its officers are acting improperly, refuse to be plaintiffs, in that case the Attorney General should be the party to file the bill. This is not the case of a joint-stock company, where it is permitted for one or more of the members to file a bill against the whole body.—*Dummer* v. *The Corporation of Chippendale*,

14 Ves. 245; *Brainbridge* v. *Burton*, 2 Beav. 539, were cited as to point of parties.

The whole scope of the statute (9 Vic., ch. 85) is clearly to enable the company to borrow 25,000*l.*; and the 3rd section, the words of which have been so strongly relied on by the other side, as well as the other clauses of the act, all depend upon the circumstance of the 25,000*l.* being borrowed.

If we are correct in our views respecting the statute, then the money not having been borrowed, all question under the 3rd section ceases. But if, as contended by the plaintiffs, that, notwithstanding the money has never been raised, the 3rd and 4th sections are in force; then under the 4th it is submitted, that the proper course for them to have adopted, was to have applied by mandamus.

Mr. Morphy, for The Desjardin Canal Company, objected that his clients were improperly before the court as defendants.

Mr. A. Wilson, in reply. The bill does not call upon the company to bring the money into court, but simply calls upon persons wrongfully holding the moneys of the company, to bring them into court; and the company, being before the court as defendants, will receive directions as to what should be done with the funds.

[THE CHANCELLOR.—Does not the new election raise a great difficulty in your way?]

We submit that we are entitled still to succeed, that having occurred since the bill was filed. The defendants are applying the funds of the corporation in a manner and for purposes not contemplated by the act of incorporation, and the bill discloses sufficient grounds for coming to the court where it asserts the fact of loans having been made. This would be the case if the loans were not subject to any animadversion; but while the answer itself discloses to whom and how these loans were made, and that 12,000*l.*, for interest alone remained due to the government, it is impossible to maintain such transactions. Nothing can be more objectionable than the mode and manner of the investment of the money, as shewn in the answer; and besides for the sum of 350*l.*, admitted to have been used by Paterson, there is no security at all, and for the 1000*l.* there is no security which can be made available, Paterson being both the mortgagor and the assignee of the mortgagee.

16th Nov.—The judgment of the court was delivered by

THE CHANCELLOR.*—The bill in this case has been filed by Hamilton and certain others, *shareholders in the Desjardin Canal Company*, on

* Esten, V. C., having been concerned in the cause while at the bar, gave no judgment.

behalf of themselves and all other shareholders who shall come in and contribute, against the directors of the company, and the company. The bill commences with a statement of an act passed by the legislature of Upper Canada, in the 7th year of the reign of Geo. IV., by which the Desjardin Canal Company was incorporated. It then states an act passed in the 9th year of her present Majesty's reign, authorising the said company to raise a further sum of 25,000*l.* for the purpose of completing their works, and in reciting the last mentioned act, it sets forth at length the third clause to which I shall have occasion to refer more particularly by and by. The bill alleges that the company went into operation, and that its works were some time since so far completed as to have become available to the public, and that the revenue derived from tolls had been considerable: that the defendant Paterson, had been elected president in 1841, which office he continued to fill up to the ime thi s suit was instituted: that Paterson, during the time he so continued president, possessed himself of the books and papers of the company, and received all the moneys payable to the company, and managed its concerns to the exclusion of his co-directors, in which course of conduct he persisted up to the filing of the bill in this suit: that during this period he had not only used the moneys of the company in his own private business, but loaned various sums to divers persons, sometimes upon mere personal security, and sometimes upon mortgage, and that on various occasions such loans were made to his co-directors. And amongst these dealings a loan to the Town Council of Dundas is particularly specified. The bill charges that Paterson refused to furnish the stockholders with an account of these dealings, although repeatedly required so to do, and especially at a meeting held on the 3rd day of April, 1848, upon which occasion certain resolutions were read to the shareholders by plaintiffs Hamilton and Hatt, requiring the directors to submit to the shareholders a detailed account of the affairs of the company, and to call a general meeting of the corporation in the month of May following to examine the said accounts, *and devise means for the completion of the canal.* The bill further charges that, although Paterson then promised to comply with those resolutions, he subsequently declined, and that in consequence of such non-compliance, the plaintiffs Hamilton and Hatt served a notice upon the president and directors, requiring them to call a special meeting of the shareholders on the 15th of January then next, for the purpose of receiving an exact statement of the affairs of the company under the 23rd section of the act of incorporation, which notice was signed by plaintiffs Hamilton and Hatt, and thirty others, representing a majority of the stockholders: that the

president having called the said meeting at Toronto instead of at Dundas, the plaintiffs Hamilton and Hatt attended and protested against its legality, notwithstanding which, the president and directors by means of their own votes, carried a resolution affirming the legality of the meeting, and, lastly, that the accounts then submitted were imperfect and fraudulent, and did not furnish the information which it was the duty of the directors to have supplied.

The bill prayed that an account might be taken of all the affairs, transactions, and dealings of the company, or of the president and directors, in relation to the said company, since the said Paterson had been appointed president thereof as aforesaid; and that an account might in like manner be taken of all moneys of the said company received by them, the said president and directors, defendants hereto, or any or either of them, or any other person or persons, by their or any or either of their order, or for their or any or either of their uses, or which without their or any or either of their wilful neglect or default might or ought to have been received, and of the application thereof and what became thereof; together with an account of all profits, gains, benefits, and advantages realized, made or received by them, or any or either of them, by means of the use or employment of the moneys of the said company, or otherwise, in relation to the concerns of the said company; and also an account of all mortgages, bills, bonds, notes, and other securities had, received, or taken for the moneys of the said company, and of the moneys due and owing thereon respectively, and that the defendants, the said president and directors, may, or some one of them may be ordered to pay the same into court by a short day to be named for that purpose, and that the said defendants may be ordered to repay to the said company all moneys received by them, or any or either of them, with interest for the same, and all profits, gains, benefits, and advantages whatever, in any way arising therefrom, and that the said defendants may, and each of them may be restrained by the order and injunction of this honorable court, from receiving any further tolls, rents, profits, or moneys of the said company arising from the said canal or otherwise, and from in any manner meddling or interfering with the affairs of the said company, or the conduct or management thereof, until the election of some fit and proper person or persons, as the president and directors of the said company; and that in the meantime some fit and proper person may be appointed by the court to receive and collect the tolls, rents, profits, and moneys of the said company, and to conduct and manage the said canal, and the affairs of the said company.

The defendants have put in their answers, wherein they affirm their

constant readiness to account as the shareholders should require; and aver, that the detailed statement of the affairs of the company is contained in the books, which are always open to the inspection of the corporators. They deny that any personal advantage was acquired by the dealings of the president and directors with the funds of the said company, and assert that they acted throughout with a view to the interest of the company; but they at the same time admit that some of the moneys of the company had been retained by the president in his own hands, and that other portions had been loaned to the directors of the company and others, as charged in the bill. The answers disclose the fact, that a new election of directors had taken place, between the filing of the bill and the coming in of the answers; at which election two of the plaintiffs, Ewart and Hamilton, had been chosen directors, and that Paterson had been re-elected president.

The defendants deny that the plaintiffs have any equity to institute this suit; they affirm that the frame of the bill is defective; that the corporation should be the plaintiffs; and they claim the same advantage as if they had pleaded or demurred.

Upon the coming in of these answers, the plaintiffs have moved that the defendants be ordered to pay into court the various sums mentioned in the notice of motion; and they argue, that they are entitled to this relief upon a two-fold ground: First, because, as trustees, the defendants have been guilty of a gross breach of trust, in dealing with the funds of the company in the manner detailed in the bill; and admitting this by their answers, they must be regarded as confessing the funds to be in their hands; under which circumstances, the order prayed, would, as they argued, be in accordance with the settled practice of this court.

Secondly, because, irrespective of improper dealings with trust funds charged upon the defendants, the 3rd section of 9th Victoria imperatively requires all the revenue of the company to be deposited in one of the chartered banks, and that this court will assist the shareholders in obliging the directors to comply with the provisions of the act in question.

The defendants, on the contrary, insist that the motion must be refused: first, because there is a defect of the parties, inasmuch as the Attorney General should be a co-plaintiff, not only on account of the large sums advanced to the corporation from the revenues of the Province, but also in order to represent and guard the interest which the public have in all works of this description; secondly, because the suit has been improperly constituted, the plaintiffs not having shown by their bill any grounds for suing on behalf of themselves and the other shareholders, and because the company should have been plaintiffs; thirdly,

because an order to pay money into court, under the circumstances of the case, would not only be unprecedented, but highly injurious to the company.

With respect to the first objection, we think it equally clear, upon reason and authority, that the Attorney General is not a necessary party to this suit.

In regard to the last objection, were it necessary now to pronounce an opinion upon that, we feel the utmost difficulty in persuading ourselves that such an order as is asked by this motion could be justified by reason or authority. The plaintiffs have argued throughout as though this were an application by the *cestui qui* trust, against his trustees, to bring into court money admitted by the answer; and no doubt were this such a case, the order, as to some of the amount at least, would be in accordance with the well understood practice of the court. But the similarity between this case and the one suggested as analogous, is much more in sound than in substance. The prayer of the bill, indeed, asks that this court should appoint a receiver, to manage the affairs of the company, and an injunction to prevent the directors—the defendants in this suit—from all interference; and had it been competent to this court to grant that relief, an order compelling the payment of the revenue of this company into court might seem more reasonable. But it is too obvious for argument, that the court has no such jurisdiction as that supposed. The principle once admitted, where should the line be drawn? This court may possibly find itself the manager of all the public companies in the province. The conduct, therefore, of the affairs of the company must be left with the president and directors; and the practical result of granting this application would be, that a company in full operation under the management of agents of its own appointment —an agency, too, *of necessity* undergoing an annual change by vote of the shareholders, and over whom, in regard to the fiscal affairs of the company, a very efficient control has been given to the corporators by their act of incorporation—such a company, so circumstanced, might find itself under the necessity, for a period, to obtain the funds necessary to meet its ordinary expenditure by a series of applications to a Court of Chancery. Could the company be carried on after such an order? Although it were competent to the court to entertain an application in this form, which, to borrow the language of Lord Cottenham, would seem to contemplate the practical dissolution of the company, we feel strongly that such a jurisdiction ought only to be exercised under circumstances of the most pressing necessity, which have not, we think, been established in this case. But if these difficulties would startle one,

though the direction remained as it was when the bill was filed, how much are they magnified when we consider that since that period the direction having been changed, two of the present plaintiffs having been elected in the room of two of the defendants? For aught that appears, the great majority of the corporation may now feel that the custody and management of their funds would be much more satisfactory and provident with the present directors, than with the Court of Chancery. We asked repeatedly during the argument, whether any precedent existed for such an order as is prayed by this motion; but the only one to which we have been referred, is the case cited in *Jeffreys* v. *Gurr* (2 B. & Ad. 833); and from the interval which occurred between the opening of this motion and reply, and the industry which has been evinced in collecting authorities upon the subject, we must assume that the case cited is the only direct authority in favour of the motion. We do not consider, however, that the authority referred to ought to govern us upon this occasion; for besides being very special in its nature, it has relation to the administration of a charity—a class of cases in regard to which this court is governed by principles and a practice not applicable to ordinary trusts.

But although we should have felt great difficulty upon the grounds stated, in ordering the funds of this company into court upon this interlocutory application, we do not find it necessary, upon this occasion, to pronounce judgment upon that portion of the case, because we are of opinion that this record has not been properly framed, and that the second objection must therefore prevail.

We are glad that this portion of the case has been so fully and ably argued, and the authorities so carefully collected, not only because the case is in itself important, and the question involved somewhat difficult of solution; but, further, because although the modern decisions are numerous, we have not found any in which the authorities have been fully reviewed, and we have not been able to satisfy ourselves that the views of all the learned judges who have decided those causes can be reconciled.

The bill in this case has been filed by the plaintiffs on behalf of themselves and all the other shareholders except the defendants (the then directors), against the then directors and the company; and it complains of a disposition of the entire funds of the company in a manner which this court does not permit in trustees, and therefore to be *remedied;* or at all events contrary to the 9th Victoria, ch. 85, and therefore to be *prevented.* I call attention again to the two-fold ground upon which the plaintiffs found their case, because, although much of

the reasoning upon which we rest our judgment will be found to apply to both grounds, yet some portion of it is exclusively applicable to the former, and we are anxious that the principles upon which we proceed should be clearly announced. The bill complains of a disposition of the entire revenue of the Desjardin Canal Company. Here is no distinct interest in one class of the corporators against another. The course pursued is an injury to the entire body, of which the company itself would seem the natural complainant; but should any good cause be shewn for not making the company plaintiffs, still the present complainants would be under the necessity of proving the correctness of the form used in this bill, which is not in accordance with the general rules of the court. In answer to arguments of this nature urged by the defendants, the plaintiffs' counsel contend, as we apprehend them, that the acts complained against, are acts of the entire body of directors, and, as such, are the acts of the company; and consequently the company could not appear as complainants upon this record. We heard nothing to convince us that upon the pleadings, as framed, the plaintiffs have a right to sue on behalf of absent parties. The argument of the complainants' counsel seems to us to involve a double fallacy: first, in order to prove the suit rightly constituted, it treats the company and its directors as so completely identified, that the former cannot, *as a company*, complain of the acts of the latter; and yet, for the purpose of relief, it so completely severs the company from the directors, that it expects this court to make a decree against the latter, without anything alleged or proved to shew us that the majority of corporators concur in asking such relief; the complainants in this bill assuming to themselves the right to represent the body of shareholders. We hold both opinions to be erroneous. We think that the corporators may, under circumstances, use the company's name in complaining of the acts of its own directors; and we are further of opinion that in those cases where, owing to circumstances, the company's name cannot be used, yet, plaintiffs assuming to sue in the form used in the bill, must, in order to entitle themselves to adopt such a course, shew that the majority of corporators concur—except, indeed, where the act complained of is plainly illegal, and so incapable of confirmation.

Before stating the reasons and authorities upon which our opinion has been grounded, we would mention, that the plaintiffs have not shewn upon the record any title to institute these proceedings. In the title of the bill, they are indeed described as shareholders; but that fact is nowhere distinctly alleged, and the court, consequently, is not informed whether they claim as original shareholders, or as assignees of

such; if as assignees, whether the requirements of the statute have been complied with. In this point of view, *Wilburn* v. *Ingilby* (1 M. & K. 61), and *Banks* v. *Parker* (16 Sim. 176), would seem authorities against the bill. We forbear, however, to give our opinion on this part of the case; because the point was not taken, so far as we recollect, and consequently has not been discussed.

We are of opinion, that nothing appears upon the face of this record, sufficient to warrant the court in entertaining a suit by the plaintiffs, *on behalf of themselves* and all the other corporators, instead of having all the shareholders made complainants, according to the ordinary practice. The introduction of this form of pleading is of comparatively modern date. Not very long since, this bill would have seemed clearly demurrable. The existence of numerous joint-stock companies, consisting of a great number of proprietors, would perhaps have rendered its adoption necessary in England, though it had been less sustainable on principle than it really is. Lord Cottenham, however, in his judgment in *Walworth* v. *Holt* (4 M. & C. 619), has justified it, not only upon necessity but also upon principle; and since that case, it has been in very general use—so much so, indeed, that it now seldom forms a subject of discussion; and from the absence of comment, a superficial reading of the cases might lead one to conclude that it would be competent to a complainant to adopt this form, without reference to the particular circumstances of his case. It is obvious, however, that this is not so, and that a complainant must follow the established practice, in bringing before the court all the persons on whose behalf the bill has been filed, unless, upon the record, he brings himself within the exception. Although the practice has now become so well established, and the rules which govern it so well observed, that it has been for the most part withdrawn from discussion, yet its existence may be clearly traced even through the cases cited for the plaintiffs. The appropriate allegations are to be found scattered through the reports of most of the cases, but, probably owing to the point there decided, stands out prominently in *Holland* v. *Baker* (3 Hare, 68; see also *Deeks* v. *Stanhope*, 14 Sim. 57).

The principle thus established with regard to joint-stock companies is, we think, equally applicable to the case of a corporation, where the corporators are obliged to come in their individual capacity, instead of using the name of the company. The cases cited fully evince this; but they also establish that corporators, in using the forms thus allowed *ex necessitate*, as it were, must conform to all the rules required in respect to joint-stock companies. We are of opinion, that this record does not allege those circumstances which must exist to entitle the

plaintiff to sue in this form. The whole stock of this company amounts to but 6,500*l.*, yet we are nowhere informed what the number of the corporators is, or, in truth, whether any reason exists for not bringing them all before the court.

But before the plaintiffs can raise the question, whether they can sue here on behalf of themselves and the other corporators, we are of opinion that they are bound to establish another point preliminary to this, namely, why the company itself has not been made the party complainant. A departure from the ordinary practice is permitted with regard to joint-stock companies, *because they have no corporate character;* and if this principle of representation were not permitted, justice would inevitably be denied when the society consisted of numerous persons. This principle has been extended to corporations *where the corporators are obliged to come in their individual capacity;* but upon reason and authority, they are confined to the excepted case. They must not only shew that their number, &c., warrant the adoption of the principle of representation, as is required with regard to joint-stock companies, but they must go one step further, and shew why they do not sue in the character with which they have been clothed by their charter or act of incorporation. If a party will not be allowed to sue on behalf of others without being himself within the exceptions, where those others have no corporate character in which they can present their case, *a fortiori*, such a departure will not be permitted in regard to shareholders who have been clothed with a corporate character, and may therefore, unless the contrary be shewn, bring their case before the court without the infringement of any settled rule. In deciding that the shareholders in an incorporated company cannot sue in the form adopted in this case, except upon reason shewn, we of course affirm their right to use the name of the company. We, in fact, distinguish between the members of the company and the directors; we regard the directors as the agents of the company, and where their acts are illegal, fraudulent, or unauthorized, we think that the corporation have a right, like any ordinary individual, to institute proceedings against their agents to correct such abuse. And in coming to this conclusion, we conceive that we infringe no rule of law, but announce a proposition well founded both in reason and on authority. Suppose a charter of incorporation should give to the body of the corporators a right to control the directors, either in all matters committed to their management, or with respect to some particular branch of their duty. Can it be doubted that in such a case the directors would be the mere agents of the body of corporators? Can it be doubted that they would be entitled, in the corporate name,

to impeach such acts of their agents? And is it not equally clear that, where the charter of incorporation is silent, the body of corporators must have such power to impeach the fraudulent or illegal acts of their agents. In all matters *left to the discretion* of the directors, upon which they have fairly exercised their judgment, *their* acts would be the acts of the company, and the corporators would be precluded from using the corporate name; but then such acts would be on the hypothesis unimpeachable; no suit could be instituted to reverse them. We shall presently refer to other arguments, upon which we ground our judgment. But as those already advanced apply to those acts of the directors of a corporation which are illegal, and so absolutely void, as well as to those which are only voidable, while the remaining considerations apply specially to such acts as are only *voidable*, and so capable of confirmation by the body of corporators, we think it will be more convenient to refer to the authorities before passing on to those other considerations.

In the *Attorney General* v. *Wilson* (1 C. & Ph. 1.), the information and bill were filed by the Attorney General, at the information of the Mayor and Burgesses of Leeds, *and the Mayor and Burgesses of Leeds*, plaintiffs, and the former directors, defendants. In that case, the Mayor and Burgesses of Leeds had accumulated a considerable sum, principally the product of fines imposed upon each other, and being desirous that those funds should not fall into the hands of such Mayor and Burgesses as might be elected after the passage of the Reform Bill, they disposed of the entire fund to the clergy and different charitable institutions in Leeds. The bill and information was filed to set aside these transactions. It was argued that it was competent to the governing body to dispose of those funds as they might see fit: that the acts of the mayor and burgesses were the acts of the whole body, and that therefore the corporation could not be heard to impeach its own acts. In combating this argument, Lord Cottenham said: "The true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purpose of injuring its interests alienating its property, shall the corporation be stopped in this court from complaining, because the act done was ostensibly an act of the corporation?" And again, "I think both objections are founded upon the same error, namely, that of confounding the *legitimate* acts of the corporation with unauthorized acts, effected by members or agents of the corporation in the name of the corporation. Of these the *corporation* may complain, and may have redress against such members or

agents as are the authors of the wrong. No doubt could be entertained of the right of the corporation to redress, against its agents. Can it be that no redress can be had against the author of the wrong, because he was a member of the corporation, and effected it by an abuse of that power which that situation gave him?"

In that case, it will be perceived that the act complained of had not been forbidden by the charter of incorporation. No power in respect to it had been vested in the corporators. But it was *illegal*, destructive of the corporate property, which it was the especial duty of the agents of the company, and the Mayor and Burgesses, to protect. It may be argued, however, that in the case just cited the defendants had ceased to be connected with the corporation; new directors, so to speak, had been elected, and so the corporation of Leeds, Mayor, Burgesses and Corporators, were all plaintiffs in the suit in question. We are of opinion that this distinction is not well founded. If the Mayor and Burgesses of Leeds of to-day, can be heard to impeach the acts of the Mayor and Burgesses of yesterday, it can only be by drawing a distinction between the governing body and the corporators, when the acts complained of are illegal. And if such distinction may be drawn when the direction has been changed, so it may, we think, although the same directors should continue in office. The company, in the sense which I now use that term, must have power to restrain the contemplated illegal acts of its agents, as well as to remedy them when accomplished. But this can only be effected by drawing the distinction pointed out, and allowing the company to institute proceedings against its agents, even during their continuance in office.

In the *Exeter and Crediton Railway Company* v. *Butler* (11 Jurist, 527, 532), the company was incorporated by act of parliament, for the purpose of constructing a particular line of railroad. Both before and subsequent to the incorporation, the corporators, as well as the directors of this company, contemplated a lease of their work when completed to the Great Western Company. But, as the work advanced, difficulties arose, and the majority of the shareholders at length came to a resolution, that they would not lease the road to the Great Western, but to the Torr Vale Company. The directors, however, were exceedingly anxious to carry out the original arrangement; and with a view, as alleged, of coercing the corporators, were proceeding to construct the work with the broad guage, which would in fact have obliged the company to carry out its contract with the Great Western, inasmuch as the Torr Vale Railroad, having been constructed with the narrow guage, could not have used the Exeter and Crediton Road, if completed as first

designed. Under these circumstances the corporators filed a bill in the name of the company against the directors, and contrary to their wishes. A motion was made to take the bill off the file, not having been authorized by the directors. It was argued that there was no authority to file the bill, and no retainer under the seal of the corporation. Sir Launcelot Shadwell, in delivering judgment, said: "that the company had a right to do it (file the bill) in the abstract, cannot, I think, be doubted." And in a subsequent part he says: "it is an extremely difficult thing to do justice to what is called a company, if you are to consider a company as a sort of a metaphysical thing, and, according to the description of Lord Coke, having neither body nor soul, and unless you really say that the company must be taken to be identified with the majority of shareholders who constitute the company." And it being urged that the corporators had never passed any resolution authorizing the filing of this bill, his Honor ordered the motion to stand for eight weeks, in order to allow the corporation time to come to some resolution on the subject. This motion was renewed before Lord Cottenham upon appeal, upon the same arguments urged before the Vice-Chancellor; and in the course of his judgment his Lordship observes (11 Jurist, 527): "it is, however, said that there is no seal affixed, and that there is no retainer for filing the bill; but, though this is so, there is a resolution which could be carried into effect by no other mode than filing a bill. *If filing a bill was necessary to prevent the directors from doing what they contemplated, the resolution gave power to file the bill*" (speaking of the resolution to lease to the Torr Vale Company). "The question therefore is, whether, when representation is made by the defendants, stating that they are the corporation, and seeking to stay the proceedings, am I to interfere, without giving the corporation an opportunity of stating whether they assent or not to the proceeding. *In doing so, I should not only be creating a great difficulty, and doing an act of injustice, but I should be laying down a very absurd rule.*"

We are of opinion, therefore, both upon reason and authority, that the majority of the shareholders in an incorporated company have a right to use the corporate name, in a suit instituted for the purpose of impeaching the acts of its directors, when those acts are either illegal, unauthorised or fraudulent. And we are further of opinion, that having such right, they are bound to adopt that course, unless indeed the majority of the corporators refuse to lend their sanction, or unless no means exist of ascertaining the wish of such majority. In either of these events, it would be competent to the corporators to sue in their individual capacity; but then they would be bound to disclose upon the

record, the circumstances which necessitated the departure from the ordinary mode of proceeding.

But if our opinion be well founded, where the act impeached is illegal and so absolutely *void*, the argument is *a fortiori* where it is only *voidable*. In the former case, the objection resolves itself into one of form. It does not affect the equity of the plaintiffs. They may have a right to come to the court for relief; but before divesting themselves of their corporate character, and suing in their individual capacity, they must shew that no means existed of setting the corporation in motion; and having failed to do so, the court cannot entertain their application. But in the latter case, the objection is not only one of form but also of substance. For upon what principle could this court permit a corporator to sue, on behalf of himself and others, to impeach *voidable* acts of the directors? It is too apparent for argument, that at the moment the Court of Chancery is pronouncing its judgments in favor of the plaintiff's claim, the majority of shareholders may be engaged in resolving, and that too conclusively, that the dealings complained of ought not to be disturbed. The objection here is one of substance. The power to affirm or disaffirm *voidable* acts is with the *cestuis que trustent*, the majority of the corporation. If the majority elect to *affirm*, then the plaintiffs, who upon such hypothesis would represent the minority, have no equity. The conclusion is inevitable. Corporators who seek to be relieved from voidable acts of their directors, must first attempt to put the corporation itself in motion. They must ascertain the will of the majority. If that majority elects to disaffirm the acts, it has a right to make use of the corporate name in seeking redress, and is bound to do so. If, on the other hand, it elects to affirm such dealings, no suit indeed can be instituted in the corporate name; but neither should there. The minority have no right to take such a step. We do not mean to lay down this as an inflexible rule. It has its exceptions. But the plaintiff, in that case, must shew upon the record why he claims to sue in a way unauthorised by the general practice of the court.

The principles of reason upon which we found our judgment seem to us fully recognised in decided cases. In *Foss* v. *Harbottle* (2 Hare, 461), the bill was filed by several persons, on behalf of themselves and all other shareholders of the Victoria Park Company except the defendants (the directors), against the directors. The facts of the case are voluminous and complicated; but it will be sufficient for our present purpose, to remark that the company had been incorporated for the constructing a public park in Manchester: that the bill disclosed a series of the most flagrant frauds, by which the defendants, after the

company had been projected, had purchased up the lands designed for the park, with a view to their subsequent sale to the company at greatly increased prices: that they had procured themselves to be elected directors, and had then purchased from themselves for the company these same lands, at a large profit: that the funds of the company, not sufficing to pay the purchase money, the directors proceeded to mortgage the lands of the company, for the purpose of raising the requisite funds; and that, although the capital expressly required by the statute, had not been subscribed. The plaintiffs in this bill sought to escape from the general rule (according to which the company ought to have been plaintiffs), by an allegation that no mode existed of putting the corporation, as a corporation, in motion, inasmuch as the only mode of calling a general meeting was by means of a notice served upon the directors; and as that body had, by death or otherwise, been reduced below the limited number, there existed in fact no body of directors upon whom notice could be served. Upon these and other grounds, which I need not now enumerate, the plaintiffs sought to establish the right to sue in the form adopted. It will be seen that the acts complained of in that case (as in the one now before the court), were in part voidable, because, although fraudulent and improper in trustees, still capable of confirmation by the *cestuis que trustent*, the majority of the corporators; others were altogether void, as contrary to the express provisions of the act of incorporation; and Sir James Wigram, in his judgment, keeps these two clases distinct. The judgment is a very luminous one, and in many parts will be found to have a very strong bearing upon this case; but we shall confine ourselves to a passage or two, which seems to us decisive of the question, if the case cited is to be regarded as law. In arguing with regard to the voidable acts, the learned judge, at page 494, says: "Whilst the court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of the proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact, that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive to shew that the frame of this suit cannot be sustained whilst that body retains its functions. In order then that this suit may be sustained, it must be shewn either that there is no such power as I have supposed remaining in the proprietors, *or at least that all means have been resorted to and found ineffectual, to set the body in motion.* This latter point is nowhere suggested in the bill. There is no suggestion that an attempt has been

made by any proprietor to set the body of proprietors in motion, or to procure a meeting to be convened for the purpose of revoking the acts complained of. The question then is, whether this bill is so framed as of necessity to exclude the supposition that the supreme body of proprietors is now in a condition to confirm the transactions in question; or, if these transactions are to be impeached in a court of justice, whether the proprietors have not power to set the corporation in motion for the purpose of vindicating its own rights."

A little further on, at page 497, he remarks: "At all events, what is there to prevent the corporators from suing in the name of the corporation? It cannot be contended that the body of proprietors have not sufficient interest in these questions to institute a suit in the name of the corporation."

And again, at page 499; "There is no longer the impediment to convening a meeting of the proprietors, *who by their vote, might direct proceedings like the present, in the name of the corporation, or of a treasurer of the corporation* (*if that were necessary*), *or who, by rejecting such a proposal, would in effect decide that the corporation was not aggrieved by the transactions in question.*"

And in disposing of those acts objected to as illegal, and so totally void, and incapable of confirmation by the directors, the learned judge observes, at page 504, "The second point which relates to the charges and incumbrances, alleged to have been illegally made on the property of the company, is open to the reasoning which I have applied to the first point upon the question—whether, in the present case, individual members are at liberty to complain in the form adopted by this bill; for why should this anomalous form of suit be resorted to, if the powers of the corporation may be called into exercise."

This decision, if it stood alone, would seem to us conclusive of the whole case, being an authority in point, and, we think, well founded in reason. But having reference to the observations of Vice-Chancellor Knight Bruce, in a very recent case—*Cooper* v. *The Shropshire Union Railway Company* (13 Jurist, 443)—which would seem to throw doubt upon all preceding decisions, and keeping in view the contrariety, or apparent contrariety, to be found in some of the judgments, we feel it due to the plaintiffs to consider further some of the cases cited.

Mozeley v. *Alston* (1 Phil. 790) was a bill filed by two corporators, in the Birmingham and Oxford Grand Junction Railway Company, against the directors *de facto*, and the company itself. The statements in this, as in most of the cases cited, are extremely voluminous; but it may be sufficient for our present purpose to state, that the bill alleged

an improper intention on the part of the directors, to amalgamate the Birminghan and Oxford Company with the Birmingham, Wolverhampton and Dudley Company, and to sell both to the Great Western Company. That the great majority of the proprietors disapproved of this intention; but the directors, with a view of defeating the wishes of the proprietary, had refused to ballot out four of their number, as provided by their act of incorporation, and were at the time of filing the bill illegally executing the office of directors, with a view of accomplishing the sale I have mentioned. I was myself present at the argument of this cause, before the Vice-Chancellor of England. It occupied very many days. And certainly, if patient investigation and great ability could ensure a sound decision, this case ought to afford a safe precedent. Having been so fully discussed, and decided too upon appeal, we regard it as of the highest authority. After disposing of the first point—that the plaintiffs could not sue, as they had done, in their individual names—the learned judge proceeds to consider what would have been the effect had they sued on behalf of themselves, and all the other shareholders of the company. He says at page 799, "The complaint against the defendants is, that they are *illegally exercising* the powers of directors, and *illegally retaining* the seal and property of the company. That, if it be an injury at all, is an injury, not to the plaintiffs personally, but to the corporation of which they are members. A usurpation of the office of directors, and therefore an invasion of the rights of the corporation; "*and yet no reason is assigned by the bill why the corporation does not put itself in motion to seek a remedy*" And then, after citing the judgment of Sir James Wigram, in *Foss* v. *Harbottle*, he says, page 800, "The same observation applies with still greater force to the present case, for not only does it not appear that the plaintiffs have no means of putting the corporation in motion, but the bill expressly alleges that a large majority of the shareholders are of the same opinion with them; and if that be so, there is obviously nothing to prevent the company from filing a bill in its corporate capacity to remedy the evil complained of. Such a bill would be free from the objection to which I have referred as existing in this case, for it would be a bill by a body legally authorized to represent the interest of all the shareholders generally; but to allow, under such circumstances, a bill to be filed by some shareholders, on behalf of themselves and others, would be to admit a form of pleading which was originally introduced on the ground of *necessity alone*, to a case in which it is obvious that no such necessity exists." But we have been referred to *Preston* v. *Grand Collier Dock Company* (11 Sim. 237), and *Bagshawe* v. *Eastern Railway Company*

(13 Jurist, 692), as direct precedents for the bill in this present case. *Preston* v. *The Dock Company* was decided in 1840, while the case we have just quoted from was determined in 1847, and upon appeal to the Lord Chancellor; if, therefore, any contrariety should be found to exist, we apprehend that the older case before the Vice-Chancellor must be considered as overruled. But we do in fact find no such contrariety as might at first sight appear. The conflict in the case in Simons was not between the proprietors and the directors, but between two classes of corporators; the one asserting that it should not be bound by having subscribed for a considerable amount of stock, for the purpose of satisfying the orders of the House of Lords, the other contending that such subscription should be held binding, and that the class of persons so subscribing should be compelled to pay calls *pari passu* with the general shareholders. Such a case is plainly distinguishable from the one now under consideration. We do not in fact see how the record could have been otherwise framed; and when this case was cited to Sir James Wigram, in the argument of *Foss* v. *Harbottle*, he distinguished it upon the grounds we have just mentioned. The plaintiff's counsel, however, relied with great confidence upon the latter case (*Bagshawe* v. *The Eastern Railway Company*), as one of recent occurrence and directly in point. We should have been much surprised to find anything decided by Sir James Wigram overruling his own luminous judgment in *Foss* v. *Harbottle*, which had been repeatedly cited by the Lord Chancellor with approbation. But upon examination (*Bagshawe* v. *The Eastern Union Railway Company* will be found to be in no degree parallel with the case in Hare, or that now before this court. The bill was filed in that case by the plaintiff, not on behalf of himself and all the shareholders in the Eastern Railway Company, but by himself, on behalf of the owners of certain scrip issued by the company under several acts of paliament, for the purpose of raising a sum designed to construct branch roads. The stock of the Eastern Union Company amounted to 7,000,000*l.*, while the sum represented by the plaintiffs, and those on whose behalf he claimed to sue, amounted to but 300,000*l.* The plaintiffs, if shareholders at all, as in our judgment they were not, could have had no right to use the company's name, for they were in direct conflict with great mass of the shareholders, in fact the whole proprietary of the Eastern Union Railway Company. In that respect it has a resemblance to Preston and the Dock Company, though possibly less questionable—we do not see how the record could have been otherwise framed. But it certainly affords no precedent for the form of pleading adopted in the case under our consideration.

Two decisions of the Master of the Rolls, have been cited to us—*Coleman* v. *Eastern Counties Railway Company* (10 Beav. 1), and *Cohen* v. *Wilkinson* (13 Jurist, 641)—which do not seem so plainly reconcileable with Lord Cottenham's Judgments. But, as we before remarked, though cases should be found in direct opposition to those upon which we rely, we should hold ourselves bound by clear declaration of law, pronounced by the Lord Chancellor upon appeal, the more especially as those decisions appear to us borne out by reason. But we are not prepared to admit that there exist, even in those cases, a conflict of authority. They are both of a very special nature, particularly that of the Jurist; and the defendants seem to have relied much more upon the want of equity than upon the defective form of the record. Indeed, in the latter case, the demurrer was only for want of equity. We may observe, too, in passing, that these reports in the Jurist would seem to be produced with too much rapidity to allow of that careful statement of the facts and arguments in the cause, requisite to enable those at a distance (and so unaware of much which persons on the spot can without difficulty ascertain) to form a correct estimate of the whole bearing of the case. Take, as an example of the observation, the case cited in the argument—*Lord* v. *The Copper Miners Company* (12 Jurist)—and contrast that report with the case in 2 Phillips, 740, and one cannot fail to observe how much is to be found in Phillips necessary to the elucidation of the judgment, which has been altogether omitted in the Jurist.

Upon the whole case, considering the great difficulties in the way of plaintiffs' eventual recovery upon this record, as at present framed; the absence of any allegation of title; the absence of any averment, warranting the plaintiffs to sue on behalf of the other corporators; the absence of all reason why the company has not been made complainants; and when we superadd to all these, the hesitation which we should feel in ordering this money into court, even though the record were correct in form, we feel that were our opinion even much more doubtful than it is, we should exercise a most unwise discretion in placing the funds of this company in court, upon this interlocutory motion.

Upon the other points of the case, we need not express an opinion; but we feel it right to say, that they seem to us to oppose serious obstacles to the plaintiffs' recovery in this suit.

Motion refused—Costs reserved.

ATTORNEY GENERAL v. MCLAUGHLIN.

Practice—Injunction—Rights of riparian proprietors.

An averment, that the soil of a stream is vested in the crown, does not import that the crown has therefore any power to interfere with the rights of riparian proprietors.

There are many cases in which the court will interfere by injunction to maintain things in *statu quo*, *pendente lite*, not only where the title of the plaintiff to relief is unquestioned, but even where that title is doubtful; provided the court sees that there is a substantial question to be settled.

But the court does not interfere by special injunction against a party in possession claiming adversely to the plaintiff; nor, on the other hand, will the court, as a general rule, so interfere in *favor* of a party in possession, to restrain a casual trespass.

On an application on behalf of the Crown for a special injunction, it appeared that the acts and threats complained of occurred eight and eleven months before the filing of the bill, and the motion for the injunction was made twelve months after the answer came in.

***Held*, that the application was too late.**

(Chancery, 1849.)

The facts of the case, so far as respects the present motion, are set forth fully in the judgment of the court.

Mr. A. Wilson and *Mr. C. Cooper* for the plaintiff.—The bill alleges, and the answer admits, certain acts to have been done by the defendant in the months of October and November, 1846, and February, 1847, to the public works on that part of the Ottawa river called "The Chaudiere Slides," which the plaintiff asserts were injurious to the works.

The defendant attempts to justify his acts, because, he says, he has been refused remuneration by the Executive Council for damage which he alleges he sustained by the construction of those works; and because the rubbish thrown by him into the channel of the river, does not, as he says, do injury to the works, and because he had, as he asserts, a right to use the water of the river, without the interference which, he says, these works have created.

We conceive that the acts in question, if not justified, are injurious to the public works, and cause an injury of that description which calls for the protection of an injunction; and we submit, that none of the grounds relied upon by the defendant can be held to be a justification of his conduct.

The refusal by the Executive Council to grant him remuneration, cannot possibly warrant the acts charged against him, if he have no right indepenently of that refusal; and besides this, the Council was not the place for him to seek relief; because the act 11 Victoria, ch. 24, and the preceding acts of that description, had established a tribunal before which he could have asserted his title to recompense upon the ground of a right.

We also submit, that although the defendant denies the rubbish which he has thrown into the river to have caused any injury to the works, yet, inasmuch as he has admitted the fact of having thrown the rubbish into the channel, that the plaintiff is entitled to the injunction; because the act of filling up the channel is an illegal act, and apart from the question of damage, will warrant the issuing of an injunction. But at any rate, as the act is illegal, and the bill asserts that it has been detrimental, the injunction might go with propriety till the fact of damage can be ascertained.

We then contend, that the acts of the defendant, committed in the fall of 1846 and in the spring of 1847, must be illegal; because the title to these works, and the right to have the stream to be so used as to be subordinate to the proper maintenance and use of these works, is vested in the Crown for the benefit of the public by the act 9 Victoria, ch. 37; and, if it were necessary to be shewn, it also appears that the public works are now in the same state that they were in when they were finished in the spring of 1846. It is true, the bill does not refer to that statute as giving title that the Crown; but it is submitted, that the court will judicially notice the act, although it be not pleaded. The acts are also against the covenant of Frith, which binds the defendant as assignee.

Amongst the cases cited were—*Robinson* v. *Lord Byron*, 1 Bro. C. C. 588; *Earl Bathurst* v. *Burden*, 2 Bro. C. C. 64; *Earl Cooper* v. *Baker*, 17 Ves. 128; Jeremy's Eq. Jurisdic. 327; *Storer* v. *Great Western Railway Company*, 6 Jurist, 1009; *Franklyn* v. *Tuton*, 5 Mad. 469; *Flint* v. *Brandon*, 8 Ves. 159.

Mr. Mowat for defendant.—The acts complained of in the information are mere common trespasses, and not a proper foundation for a special injunction.—*Mogg* v. *Mogg*, Dick. 670; *Mortimer* v. *Cottrell*, 2 Cox. 205; *Courthope* v. *Maplesden*, 10 Ves. 290; *Deere* v. *Craig*, 1 M. & C. 576.

The defendant's conduct is no breach of the covenant set out. He has not interfered with any government works "*on the demised premises;*" and to these, the covenant is expressly confined. The government had no right to erect slides to impede the navigation of the river, or to interfere with the mills thereon.—*Attorney General* v. *Richards*, 2 Ans. 605; *Attorney General* v. *Johnston*, 2 Wils. ch. 101. It also appears from the answer, that the defendant, and those through whom he claims, have used the water for their mills for twenty years. Their right to the water is also implied in, and goes with, the defendant's property, as appurtenant under the lease from the government, by its officers. This

court, at all events, will not interfere in a case like the present, without a trial at law being first had. This should have taken place long ago. —*Earl of Ripon* v. *Hobart*, Cooper Temp. Brougham, 333; *Attorney General* v. *Johnson*, 2 Wils. ch. 87; *Attorney General* v. *Cleaver*, 18 Ves. 211; *Birmingham Canal Company* v. *Lloyd*, ib. 515; *Crowder* v. *Tinkler*, 19 Ves. 617. This bill has been filed, and the present application is made, far too long after the commission of the acts complained of, to entitle the Attorney General to a special injunction now.

30*th November*.—The judgment of the court was delivered by

THE CHANCELLOR.*—The information in this case was filed on the 22nd of October, 1847.. It states that the broken front of lot No. 40, in the township of Nepean, was in the year 1809 granted by his then Majesty to one Randall, in fee simple: that the said parcel of land, by several mesne assignments, became vested in one Sherwood in fee, who in the year 1829 conveyed one acre thereof to his then Majesty in fee: that the aforesaid parcel of land was acquired by his Majesty under the provisions of an act of the parliament of Upper Canada, authorising the construction of the Rideau Canal, and that the consideration for the same was paid out of "public funds:" that upon the day of the execution of the last mentioned conveyance, one John By, an officer in his Majesty's service, then engaged in the construction of the said work, demised the said acres of land to one Frith, for thirty years; and in consideration of expenditure already incurred by the said lessee in the erection of mills upon the said premises, the said By agreed to forego the stipulated rent for a period of fifteen years. The indenture of lease first referred to, contained covenants on the part of the lessee which have been set out in the information, as evincing the right of the crown to the relief now asked, to which we shall not now further allude as it will be necessary to refer to them more particularly by and by. It appears that all the interest of Frith in the demised premises has been assigned to the defendant, who has been for some time and now is in possession of the same. The information further states that the soil of the river Ottawa is vested in her Majesty, in right of her crown, as is also the land on both banks, and both above and below the broken front of lot 40: that large quantities of timber are annually floated down the river Ottawa; and that in consequence of obstruction in that part opposite lot 40, various slides had been constructed by government, several years before the filing of the information, along the course of the Chaudiere rapids, to facilitate the passage of timber, which was

* ESTEN, V. C., gave no judgment, having been engaged in the cause while at the bar.

subject to a toll for the use of such works; and that such toll constituted part of the revenues of the province: that such works had not *materialy* interfered with the natural flow of the stream, or prevented the efficient working of the mills of defendant: that in the month of *October*, 1846, the defendant had deposited, or rather allowed to accumulate from his saw mill, between his mill dam and the edge of the slide, a pile, consisting of saw dust, planks, and pine bark: that one Graham, on the part of the government, had desired the defendant, on the 21*st of November*, 1846, to remove the said obstruction, but that he had refused to comply, asserting an equal right with the government to the use of the channel in question.. And the information alleges, that should the obstruction be allowed to remain, "*and should other piles and heaps be placed in the said channel and suffered to remain, the operation of the said slide would be greatly obstructed:*" that on the same 21*st of November*, 1846, the engineer in charge of the works had caused certain stop logs to be placed at a point designated on the map as A, for the purpose of shutting off the water, in order to repair the slides: that the defendant had removed those logs, or some of them, *in consequence of which the repairs had been delayed some hours:* that on the 22*nd day of February*, 1857, the defendant had caused some saw logs to be placed in front of a point designated *sluice B*, and that such logs, if continued, would prove injurious to the works, which required the water to flow through sluce B as well as through the slide. The information, after stating a covenant contained in the conveyance from Sherwood to his then Majesty, which I shall not further notice, because it was admitted that it could not affect this application, proceeds to aver that, should the closing of sluice B be repeated, the traffic and business of the said works would be greatly impeded in a way which could hardly be estimated, or possibly diverted into other channels, and the public revenue thereby much diminished.

The information then sets forth a pretence made by the defendant, that prior to the construction of the Chaudiere slides, he, the defendant, had a dam in the river, and that the officers employed in the construction of those works had promised that the bottom of the slide B should not be lower than the top of his dam had been, and this pretence is said to be false; and it is charged that, on the contrary, the defendant, *in November*, 1846, and since, claimed a right to the uninterrupted use of the water, and threatened not only to remove a log from gate A, as he had already done, but to remove the gate altogether, as he claimed a right to do. And it is further charged that the defendant, so far from acceding to the request of the officer in charge to open sluice B, affirmed

his right to close the same as he should find necessary for his mill. And the information, having alleged that any interruption of the works for even a few hours during the passage of timber, would produce a considerable loss of revenue, charges that the defendant persists in his wrongful acts, and avows his determination to repeat them as he should see occasion.

The prayer is "for an injunction, restraining the said Daniel McLaughlin, his workmen, servants and agents, from placing or causing to be placed any rubbish heaps or piles whatsoever in the said channel or elsewhere, in any part of the said slide, matter or any work, or thing connected therewith; and from removing, displacing, or anywise disturbing or intermeddling with any stop-logs or other logs, matters or things, now or at any time hereafter to be let down or placed or fixed in the said entrance-gate; and from in any manner cutting or forcing open or opening the said entrance-gate, when the same shall be closed, at any time or times; and from in any manner hindering, obstructing or delaying, any repairs or repair whatsoever to the said slides or any part thereof, and from closing or in any degree stopping up, obstructing or incumbering, the said sluice-gate in any manner; and from, at any time or times, hindering or preventing any water from or diminishing the quantity of water passing through the same; and from doing, committing or causing, or suffering or permitting to be done, committed or executed, any act, deed, matter or thing whatsoever, whereby or by reason or in consequence whereof the said slides, or any of them, or any parts or part thereof respectively, or any work, matter or thing, appertaining thereto or connected therewith, or the operation, use or business thereof, may be injured, damaged, hindered, obstructed, retarded, or prejudicially affected in any manner whatsoever; and also her Majesty's most gracious writ of *subpœna* to appear and answer, to be directed to the said Daniel McLaughlin."

The defendant's answer was filed on the 8th of December, 1848. But the conclusion to which we have come, precludes the necessity of any detailed statement of its contents. It will suffice to say, that the defendant claims a right to enjoy the water of the Ottawa in its course; affirms that the agents of the crown, in defiance of his rights, have on repeated occasions wrongfully shut off the water from his mill by means of the entrance-gate, which interruption on one occasion continued for a period of six months; and that the bottom of sluice B was, *after the completion of the work*, lowered so as to diminish materially his head of water. He swears that neither the entrance-gate nor sluice B is in any respect necessary to the successful operation of the slides, and that no

rubbish has ever been accumulated in the channel, sufficient to obstruct the passage of timber in any degree; and he claims a right to the use of the water for the purpose of carrying away the refuse of his saw mill.

The learned counsel for the crown now moves for a special injunction, in the terms of the prayer of the information, upon the admissions in the answer, which they contend they are entitled to on a two-fold ground. 1st, Because the conduct of this defendant is a direct breach of the covenants entered into by Frith. And 2ndly, Because the jurisdiction of this court to enjoin to trespass is now firmly established, where the injury would be otherwise irreparable. They argued that the injury stated in the information comes within the definition *irreparable* injury, and that this court will not only enjoin the defendant upon the final determination of the rights of parties, but will in the interim keep matters in *statu quo*, until such determination.

We think that the learned counsel for the crown have failed to establish the propriety of granting this injunction, upon either of the grounds insisted on by them on the argument of this motion. But beyond the points then discussed, we are very clear that no case has been made on behalf of the crown which could warrant the interference of the court. The Attorney General has told us, in the information, that "*the soil of the river Ottawa is vested in her Majesty in right of her crown.*" That is the single allegation upon which the whole information has been based. He has nowhere informed us whether he claims, on behalf of the crown, a right to obstruct the natural flow of the water of the river Ottawa, in any way or to any extent; and the court is of course uninformed of the grounds upon which such claim is supposed to rest. The soil is said to be in the crown, but that fact does not necessarily impart any right to obstruct or divert the water; nay, it is quite consistent with the right of every riparian proprietor, to insist upon the water being allowed to flow in its accustomed course. The soil underneath streams is frequently vested in the subject, but that by no means imports a right to interfere with the easement of the riparian proprietors, to have the water flow on over the soil at its natural level. Nay, it is quite consistent with such easement.

But we were referred to the 9 Vic., ch. 37, as establishing a legislative title in the crown. Assuming that we are to take notice of this act, thought it would undoubtedly have been more in accordance with the rules of pleading to have referred to the statute, and deduced from it such rights as it was supposed to confer, yet, without deciding anything upon the form, and assuming that we can strengthen the case by reference to that enactment, still the case made by the information re-

mains imperfect as ever. True, the act has vested in her Majesty the slides on the Chaudiere rapids. But there is no allegation that the slides, as they *then* existed, did in any degree interfere with the rights of the proprietors upon this stream. For aught that appears, the legislature may have intended to improve the stream, so far as that could be accomplished without any injurious obstruction of the water, and without any intention of affecting the rights of occupiers. But whatever may have been the purpose of the legislature, there is no allegation that, at the time of trespass, the works remained in the same condition they were in at the time the act in question received the royal assent. Suppose that, at the period alluded to, there had been no entrance-gate, or that the one then existing wanted the stop-log, which the defendant is said to have removed. Suppose the sluice B, instead of remaining as at the time the act passed, to have been lowered so as to diminish the defendant's head of water; could it be argued that an act vesting in the crown works, injurious to the defendant in a minor degree, or possibly in no degree at all, would in any way confer a right to alter such works so as to destroy or materially injure his water power? Assuredly not. The defendant is upon the face of this information stated to be a riparian proprietor, *prima facie*, he would be entitled to the benefit of the water flowing by his mill, without obstruction or interruption. Nay, his right is to a great extent admitted by this information itself. What is there to justify the servants of the crown in shutting off the water from the defendant's mill, by closing the entrance-gate? Consistently with all that appears either in the information or the act, that erection may be a nuisance, and the defendant instead of a wrong-doer, may have only exercised an undoubted legal right in entering to abate it (*Attorney General* v. *Corporation of London*, 12 Jurist, 379).

Upon these grounds, we are of opinion, that this motion must have failed, even though we had considered the cases cited, and reasoning urged upon us by the learned counsel for the crown, as applicable. But we have not felt at liberty to pass over the important points raised in the argument; because, although this power of the court to interfere by injunction has been very frequently invoked, and is certainly highly beneficial, we yet feel that great danger attends its exercise, and that no branch of equitable jurisdiction requires greater discretion and caution. We are not insensible to the difficult, if not impossibility, of bringing all the cases in which a special injunction should be granted within any general rule, and we think that we should ill discharge our duty were we by any general proposition, to limit the power of the court

in this respect. For if it be the duty of courts of equity in *England* to modify their rules and practice to meet the growing wants of society, *a fortiori*, must *we* labor to render those rules effectual for the ends of justice in our social condition, differing as it does in many respects so widely from that of England. And if the observation be true as regards equitable jurisdiction, its force cannot fail to be peculiarly felt in relation to the particular branch we are now considering, which has been from time to time modified by the English courts to meet new emergencies, and although likely to be ere long further varied, is plainly perceived to be administered, in its present condition, on very different principles from those which governed its exercise half a century since. The series of decisions before Lord Cottenham, collected and reviewed in the case of *Tobin and Merritt* in this court, have corrected much of the abuse which had gradually crept into the practice of the court in restraining actions at law, and have placed that branch of the jurisdiction on a satisfactory footing. But the principles by which this court is governed in granting special injunctions, would seem by no means so clearly defined, and in relation to the power here invoked, of restraining trespass to realty, appear to accord but imperfectly with reason. Before considering, however, that branch of the case, we shall refer to the argument arising upon the covenants in the lease, which seems to us quite free from doubt. It has been argued by the learned counsel on behalf of the crown, that it is the daily habit of this court to enforce by injunction, the performance of covenants; that here, the defendant has covenanted not to injure any public works in existence at the time the indenture of lease was executed or thereafter to be erected; and that this court will restrain the flagrant breach of those covenants by the special injunction now asked for. It cannot be doubted that this court is in the daily practice of enjoining parties from violating their covenants, and that it will, *under circumstances*, exercise its power by special injunction, pending the final determination of the rights of the parties. We believe this power, carefully exercised, to be highly beneficial, and feel no disposition to restrict in any degree those modern decisons in England, which have determined that purchasers of land, with notice of the existence of covenants, will be restrained by this court from violating such covenants, although they do not run with the land, and are therefore inoperative *at law* against the party enjoined (*Tulk* v. *Moxay*, 13 Jurist, 26, 89; *Mann* v. *Stephenson*, 15 Sim. 377; *Rigby* v. *Great Western Railroad Company*, 2 Phil. 44). But if that doctrine be clear, it is equally evident that it can have no effect upon this case, for the covenants are manifestly restricted to public works erected "*upon*

the demised premises," while all those specified in the information have been erected upon land vested in the crown and alleged to be in the actual possession of its agents.

But it has been argued further, that the jurisdiction of this court to enjoin against trespass has now become firmly established; that the information states a case of irreparable mischief; and that this court ought, therefore, to preserve everything in *statu quo*, even though the title of the crown should be regarded as doubtful.

Undoubtedly this court has jurisdiction to restrain acts, which a party is bound either by contract or duty to abstain from. And in the exercise of that jurisdiction it will maintain things in *statu quo pendente lite*, not only where the title of the plaintiff to relief is unquestioned, but even where that title is doubtful, provided it sees that there is a substantial question to be settled. We feel indeed, that much care and caution are requisite for the beneficial exercise of this power; but we also feel, that were the jurisdiction of the court in this respect restricted, it would in many cases want the means of doing substantial justice between the parties. *The Great Western Railway Campany* v. *The Birmingham and Oxford Grand Junction Railway Company* (1 Ph. 597), involved enormous pecunary interests. The interim injunction there was strenously resisted, as vitally affecting most important interests, while the equity of the plaintiff remained as yet undetermined. But in that case we find this language attributed to Lord Cottenham: "It is certain that the court will in many cases interfere and preserve the property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title, but it would embarrass the original purchaser in his suit against the vendor, which the court prevents, by its injunction. Such are the cases *Echliff* v. *Baldwin; Curtis* v. *Lord Buckingham; Spiller* v. *Spiller*, per Lord Redesdale in Dow. 440. It is true that the court will not so interfere, if it thinks there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such questions can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff."

"If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favor of the defendants, and so inadequate to support the relief

prayed by the bill, as to justify the court in permitting it to be disposed of, and new titles or interests to be introduced, before any decision can be obtained upon the case so made?"

The case of *Hills* v. *Croll*, as reported in 2nd Phil. 60, would seem hardly reconcilable with the current of authority. But the injunction was refused there on a principle which has no application to the present case. It was contended there that the contract wanted mutuality, and that the court, as it *could not* enforce performance by the plaintiff *would not* enjoin the defendant. We doubt besides, whether that case has been thoroughly understood, the more so as Lord Cottenham in a more recent decision (*Dietrichsen* v. *Cabburn*, 2 Phil. 52), after a full review of the authorities, takes a different view of the law from that which his lordship would seem to have done in *Hills* v. *Croll*, according to the note in Phillips.

But assuming that *The Great Western Railway Company* v. *The Oxford and Birmingham Junction Railway Company* lays down correctly the rule of this court, and admitting the ends of justice would be better attained by the application of that rule to cases of trespass, we are of opinion that the authorities would not warrant us in coming to such conclusion. If the ends of justice are better attained by preserving matters in *statu quo* pending litigation, in the class of cases to which we have referred, we know not why the same principle should not be applied, with even more propriety, in matters of trespass, and that whether the complainant be in or out of possession. Nevertheless, the law unquestionably is so, and it is for us to administer the law as we find it, and not to legislate. It is true, indeed, that Mr. Vice-Chancellor Knight Bruce, in *Haigh* v. *Jagger* (2 Coll. 231), is reported to have said: "I am not convinced that where a man is in possession, however full and complete, of an estate, simply and merely adverse to that of another by whom the estate is, whether at law or in equity, claimed against him, without any privity between them, such a state of things, if the party in possession by his answer, whether truly or untruly, swears his title to be just and valid, or that of his adversary to be unjust and invalid, does of necessity prevent a court of equity from interfering (before any judgment at law or decree in equity) to restrain the party in possession from striping the estate of its timbers, pulling down the mansion house upon it, or other such acts." Reason seconds the doubt of his Honor. But we see no mode of giving suitors the benefit of that reasonable doubt in the face of direct decisions. In a recent case before Sir James Wigram (*Davenport* v. *Davenport*, 13 Jurist, 227), the plaintiff laid claim to lands in Cheshire, stated that the

party in possession had marked the trees on the estate and advertised them for sale by auction, that they were ornamental, and their destruction would be attended with irreparable mischief, and applied for a special injunction. After a careful review of the cases, and amongst the number that one before Vice-Chancellor Knight Bruce, his Honor said: "There did not appear to be any case in which a party coming to this court against another in possession, who claimed to be entitled to cut timber, had ever obtained an injunction to restrain him from so doing, till his title had been established at law." And again: "The principle is well settled, that a party out of possession must establish his right at law before he comes into equity." In the *Attorney General* v. *Hallett* (16 M. & W. 5, 9), an information had been filed by the Attorney General, on behalf of the crown, stating an encroachment on the royal forest of Waltham in Essex. The Attorney General had demurred to the pleas of the defendant; and pending the judgment of the court, the defendant having commenced to cut down the trees and underwood, the Attorney General moved for a special injunction, which was unanimously refused. Baron Alderson says (page 573): "This is an application in equity; now in equity, if a wood is claimed in ejectment against a party in possession, no injunction lies against him in general for cutting it." And again (page 574): "This act on land within a forest would, without doubt, be waste. The question is, whether pending a trial of fact as to title, we should grant an injunction."

In the cases just cited, the court refused to interfere by special injunction against the party in possession claiming adversely to the plaintiff. The converse is equally true. This court will not, as a general rule, interfere *in favor* of a party *in possession* to restrain a casual trespass (Drewry, 188; 19 Ves. 155; 3 Mer. 173).

But here the defendant, judging even from the information, is not a mere trespasser. Looking to his answer, he asserts that he is entitled to have the water of this stream flow to his mill in its accustomed manner. *Prima facie* as a riparian proprietor, he would undoubtedly be entitled to such an easement. The information has asserted no title in the crown adverse to him. Under such circumstances, so far from being a trespasser, he would unquestionably have a right to enter upon the lands of the crown, to abate that which, for aught that has yet appeared, is a nuisance. No precedent has been cited which could warrant a special injunction in such a case.

But we are clearly of opinion that, under the particular circumstances of this case, we could not have granted this application, although it had been brought within rules which govern this court, in the exercise of

its jurisdiction as clearly as it seems to us to have been excluded. If this court has been governed by a narrow and erroneous rule in refusing to prevent trespass by special injunction, in what does that error consist? Why, plainly in this; that pending the time *necessarily* consumed in determining finally the right, a mere wrong-doer may have it in his power to inflict injury which, though not irreparable in the eye of the law, would in common parlance be regarded as such. This is the ground upon which the interim interference of the court, where it does interfere, has been justified. Upon these grounds its refusal to interfere is objected against, where it declines to act. The desideratum therefore is a power to enjoin trespass, and preserve matters in *statu quo* pending the litigation. Does not the simple statement of the evil and its remedy shew conclusively that the complainant can have no ground to ask, and this court no jurisdiction to grant the protection of a special injunction, where the application has been delayed without necessity or some very cogent excuse?—Where the complainant, instead of coming promptly for his injunction, and then pressing forward the determination of his rights, legal or equitable, suffers more time to elapse than would have sufficed, without injunctions to have obtained the decision of the proper tribunal? When this court grants a special injunction, unnecessary delay in proceeding to trial has been always deemed a sufficient reason for dissolving such injunction. How can the court grant the writ where unreasonable delay has occurred before it has been applied for?

In the *Birmingham Canal Company* v. *Lloyd* (18 Ves. 516), the injury complained of was of the most serious character, drawing off the water by which the canal was supplied, yet Lord Eldon refused an injunction on account of delay, leaving the plaintiffs to their action at law.

In the *Earl of Ripon* v. *Hobart* (3 M. & K. 169), the bill was filed by commissioners appointed by act of parliament to improve the navigation of the river Witham from Lincoln to the sea, and drain the fens on both sides of the river. The defendants were commissioners who had been appointed by a local act, for draining certain fens within three parishes in the county of Lincoln. The bill complained that the course pursued by the defendants was likely to cause irreparable mischief by breaking down the banks of the Witham and flooding the country which the plaintiffs had drained. Lord Brougham in delivering judgment, said—"The danger apprehended by the *Birmingham Canal Company* v. *Lloyd* was of a very serious nature—that of draining off the water from a great reservoir of the canal: and yet Lord Eldon refused the injunction, leaving the company, as he said, to take their

chance at law, because they had delayed coming to the court till two years after notice to the defendant. Here indeed (his lordship continues) the delay was only nine months, but there was a counter notice in that case as well as this, and it made no difference on the consideration of the court as to the party's laches. Lord Eldon then added, 'they must establish their right to damages at law, before I ought to grant this injunction.' So that he held this delay to have been sufficient to deprive them of the preventive relief altogether. But the conduct of the plaintiffs here gives rise to the further remark, that in a case of this kind, where the application is not against an admitted nuisance, but against a work which may or may not be noxious, according to circumstances, the party alleging mischief has no middle course between coming in the very first instance and waiting until he can satisfy the court by a verdict at law, that he is right both as to his title and as to the mischief."

And in *Parker* v. *North Staffordshire Railway Company* (12 Jurist, 589), Lord Cottenham says: "A party coming for an injunction is bound to come quickly upon the discovery of his rights, and without having in any manner led the opposite party to suppose his case to be different from that which he really intends to make."

Here the trespass and the threats occurred in November, 1846, and February, 1847. The bill is not filed till October, 1847, allowing an entire season of navigation to elapse. The answer comes in, in December, 1848, and the motion is only made in December, 1849. A simple enumeration of the dates is conclusive against the granting a special injunction for interim protection in this case (*a*).

MUNICIPAL COUNCIL OF ESSEX, KENT, AND LAMBTON, v. BABY.

Motion to set aside interlocutory judgment and cognovit—Principal and surety.

The defendant was one of two sureties in a bond, on which the obligee sued. An arrangement was made between his principal, his co-surety and the plaintiffs, to which he did not consent as to himself, but to which he offered no objection as regards his principal and surety. Subsequently an action being brought on the bond against him, he allowed judgment to go by default, and gave a cognovit reserving any means he might have in equity to relieve himself. He now applied to set aside the judgment and cognovit, which, under the circumstances, the *Court held*, could not be done. *Quære:* Whether the release given by the warden to the principal and one of the sureties, as mentioned in the statement and judgment of the Court, was binding at law?

(Q. B., T. T., 15 Vic.

The defendant C. Baby, was one of two sureties in a bond. An action being brought on this bond, 30th July, 1850, an arrangement

(*a*) As to the maxim *Nullum tempus occurrit regi*, see Broom's Leg. Max., p. 46.

was proposed on 2nd October, 1850, at the consideration of which defendant was present; and it was then proposed that the principal, J. B. Baby, and the other surety, Hall, should be released on certain payments being made by them. The now defendant, who was the other surety, did not object to being held liable at all if his principle was released, but only objected to the amount it was intended he should contribute; and in consequence the arrangement was not concluded. This arrangement failing, the council gave directions to their attorney to proceed in the action on the bond, whereupon an arrangement was effected between the principal, J. B. B., one of the sureties, Hall, and the council. Confessions were taken from them, and a release given them by the warden of the council, sealed with the seal of the council, saving the council's right of action against the other surety, the now defendant, C. B. This was on the 8th October, 1850. The council then brought their action against C. B., and he allowed judgment to go by default, and afterwards, to avoid the necessity of an assessment of damages at the assizes, gave a confession of judgment on or about the 11th of April, 1851, with a condition attached thereto, that the actual amount of damages should be determined by arbitrators, (at whose meetings C. B. subsequently attended,) and that he should rely on a suit he had instituted in Chancery for any relief from any liability from the bond sued on in this action. In the spring of 1850, an action by J. B. B. against C. B. had been arranged, by C. B. admitting that upwards of 1,700*l.* was due to J. B. B. A verdict had been also found in another action brought by J. B. B. against C. B. for 1,000*l.*; and on the 25th October, 1850, C. B. gave a release to J. B. B. of all claims whatsoever, which he might by any means have against him, either in law or in equity. He, defendant, now applied to set aside the interlocutory judgment and confession, and filed an affidavit, stating that he was no party to the arrangements between the council and his principal and Hall—admitting however, that the proposition was named to him before completed; that the arrangement itself was made known to him on 9th October, 1850, and that he considered himself discharged; but that the council proceeding against him he took advice of counsel, stating, as he then believed, that no release under seal had been made to the other obligors in the bond; that, being advised that he had no defence at law, he took the course above mentioned, and that it was not till the 18th or 19th of May, 1851, that he knew positively of the existence of the release under seal.

A. Prince, shewed cause against rule nisi to set aside interlocutory judgment and confession. He contended that it was not necessary that

defendant should have been a party to the arrangement between the council and the obligors of the bond; it was enough if he knew of and assented to it.—*Philpott* v. *Aslett* (1 C. M. & R. 85; *Bright et al. Exor's* v. *Brewer*, 3 Dowl. 266; *Davison* v. *Franklin*, 1 B. & Ad. 142; *Flight* v. *Chaplin*, 2 B. & Ad. 112). His discovery of the release being under seal would be no sufficient reason in equity, and he referred to the defeazance in the cognovit which confined him to equity for any remedy. He, defendant, had released his *principal* before plaintiff released him, and so the reason in *Smith et al.* v. *Winter* (4 M. & W. 454) for discharge fails. He could have no remedy against his principal (Bucks Rep. 517; *Boultbee* v. *Stubbs; Owen* v. *Homad*, 18 Ves. 20; 14 Jur. 821).

J. H. Cameron, Q. C, contra, insisted that the arrangement was without the defendant's consent, which is all that is material. He referred to the defeazance as supporting this application. He denied that defendant had released his principal from such liabilities as would preclude him from recovering for this.

ROBINSON, C. J., delivered the judgment of the court.

It is on these statements and papers that the plaintiffs resist the application now made to us by the defendant to set aside the interlocutory judgment and cognovit, and let him in to plead the release given to J. B. Baby by the warden, as discharging him, the defendant, from all liability under the bond sued on in this action.

The application is founded on an affidavit of the defendant, in which he swears that he was not in any way a party to the arrangements by which the suits against J. B. Baby and Hall were discontinued; and these cognovits, taken for 1,000*l.* each, payable on the 1st of January, 1852; and he speaks of the arrangement as a fact "*which he afterwards learnt*," though he admits "that the agreement or proposition was named to him before it was completed;" that he declined to accede to it, owing to J. B. Baby having then sued him on his bond as surety for Wood: that the above arrangement having come to his knowledge through John Prince, Esq., the counsel for the plaintiffs (the District Council), by letter written 9th October, 1850, informing him that J. B. Baby and Hall had been discharged by the plaintiffs, *he considered* himself altogether discharged from this action, which conclusion Mr. Prince afterwards confirmed by expressing his opinion to that effect in presence of him, the defendant, and of the plaintiffs' attorney, and the warden of the county: that the plaintiffs have, nevertheless, continued to proceed in this action, and that he in consequence advised with counsel as to what plea he should put in stating the above facts; and also, that there

had been no sealed release of J. B. Baby and Hall, which the defendant believed then to be the case: that he was advised he had no defence at law, because there was no release under seal, and that he could only seek relief in equity: that he did, in consequence, file a bill in equity, to restrain further proceedings in this action: that the notice of assessment for the assizes in April, 1851, was given to him, and in order to save trouble and expense, he proposed to give a cognovit for 1,000*l.*, with such defeazance as is attached to the one given by him on the 14th of April, 1851: that on the 19th April, 1851, he had occasion to refer to Mr. Vidal (attorney for J. B. Baby and Hall), to learn the exact nature of the arrangement between the plaintiffs and them, when he was told that he thought he had obtained a release from the plaintiffs, under the hand and seal of the warden of the united counties: that the first time he was satisfied or knew positively of the existence of the said release under the hand and seal of the warden, was on the 18th or 19th day of May last past, and that he has now ascertained the fact to be, that when the arrangement was made, Hall and J. B. Baby, both received releases under seal from the municipal corporation; but of this fact, he, this deponent, was entirely ignorant until after the execution of the said cognovit. This affidavit is sworn to 3rd June, 1851. A copy is annexed to this affidavit of the releases given to J. B. Baby and Hall. They are both in the same terms. That to the treasurer J. B. Baby, is as follows:—

"Know all men, that *I, George Hyde, warden of the united counties of Essex, Kent and Lambton, on behalf of the municipal corporation* of the said counties, in consideration of 1,000*l.* to me on behalf of the said united counties well and truly paid by the said J. B. Baby, have remised, released, and forever discharged, and by these presents do, for and on the part of the said municipal corporation, remise, release, and forever discharge, the said J. B. Baby, his heirs, &c., of and from all and all manner of actions, causes of actions, suits, debts, dues, sums of money, accounts, bonds, judgments, claims, and demands, whatsoever, in law and equity, which the said municipal corporation of the united counties of Essex, Kent and Lambton, ever had, now have, or can, shall, or may have, for or by reason of any matter, cause or thing whatsoever, against him to the date of these presents, save and except from claims, demands or action and judgment upon or on account of a certain cognovit, executed by the said J. B. Baby on the day of the date of these presents, confessing debt to the amount of 1,000*l.*, payable on 1st of January, 1852, and which is the true consideration above mentioned."

This release is dated 8th October, 1850, and professes to be executed

by George Hyde, as warden as aforesaid, affixing the seal of the municipal council of the united counties of Essex, Kent and Lambton.

The defendant's affidavit is supported by one of Mr. Vidal, stating that he was attorney for J. B. Baby and Hall in the suits brought upon their bond; that as such he made a proposal to the plaintiffs on the 8th of October, 1850, that they should give their cognovits for 1,000*l.* each, payable on the 1st of January, 1852, without interest, upon the plaintiffs agreeing to release them from all claims they had against them, leaving the action against C. Baby to be proceeded with if they thought proper to do so; that C. Baby was in no way a party thereto; that on the 19th of April, 1851, he first informed C. Baby of the existence of a release under the hand and seal *of the warden* (Pitman on Surety, 180; *Smith et al.* v. *Winter*, 4 M. & W. 454; *Mayhew et al.* v. *Crickett et al.*, 2 Swans, 185,) of the united counties to J. B. Baby and Hall, and stated that if he (Vidal) had not yet received it, he was to get it from the attorney of the council.

And he further swears that he believes that the first time the said C. Baby *knew* of the *existence* of *the said releases* in *fact* was on the 18th or 19th day of May last (1851).

We find it impossible, on a view of all these proceedings, and the statements contained in the affidavits, to grant the application. In the first place, there is a question which is strictly a legal one, whether what is shewn as a release to J. B. Baby from the municipal corporation can be held to have any legal effect in discharging him from his bond. In the affidavits it is sometimes spoken of as being a release under the hand and seal of the warden; in others it is said to be under the seal of the corporation. In what is placed before us as a copy of the instrument the seal of the corporation is said to be affixed. How the fact was, does not appear, but there seems to be no doubt that it is not the corporation who releases, but Mr. Hyde, the Warden, on behalf of the corporation. And it is not shewn that either any by-law was passed authorizing the release, or any resolution come to by the council in session, and authenticated by their seal or otherwise.

The mere affidavit of the warden, stating in general terms that, by the authority of the council he negotiated, does not enable us to see that there is in fact any such release in existence as can discharge the bond.

But then, on the broad ground of merits, we are asked to take away from the plaintiffs the double proof they have of the debt—first, by the defendant's having deliberately and intentionally suffered judgment by default; and next by his having afterwards confessed judgment for

the express purpose of rendering an assessment of damages unnecessary, and to throw it open to dispute their right to recover, by pleading that they have released his principal, and have therefore as a legal consequence whether intending it or not, discharged him.

We ought not to do this, in order to give the defendant the means of placing himself in a position different from that in which it was intended he should stand when the arrangement in question was come to, if to place him in that position would be an unjust surprise upon the plaintiffs, and would have the effect of relieving him from a liability which he allowed them to suppose he would still abide by.

This is an application to the discretion of the court, which ought always, as Lord Tenterden observed in *Davison* v. *Franklin* (1 B. & Ad. 144), to be exercised so as to best advance the ends of justice. Now, it would be stating the case perhaps too favorably for the side of the defendant, if we were to say that the papers before us make it at least doubtful whether we should be advancing the ends of justice if we should relieve him now from the judgment and confession, in order that he might set up the release to the treasurer as a bar to a recovery against himself. I apprehend the inference would appear irresistible to any one who examines the proceedings and affidavits filed, that such an interference would have a most unjust operation.

The defendant does not deny that he was a party to the discussion when the first attempt at a compromise was made; and, although it was proposed in the settlement that J. B. Baby and Hall were to be released on certain payments being made, and that the defendant was to contribute to those payments, he does not assert that he objected to being held liable at all, and for any amount, if his principal should be released; and he does not deny, what is sworn on the other side, that that proposition only fell through because he objected to the amount which he was required to contribute as one of the obligors, and this by reason of the treasurer having proceeded against him on his other bond as securtiy for Wood. Indeed, in his affidavits he admits this.

Then the defendant, though he swears that he was ignorant of the precise fact of J. B. Baby and Hall having received releases under seal until after he had executed the cognovit, does not swear, and I should think from Mr. Prince's affidavit, and other statements on the subject, he would not declare, that he did not so early as 9th October, and long before April, 1851, when he confessed judgment, well understand that the basis of the arrangement of the 8th October, 1850, was, that only a certain sum was to be exacted from each of his co-obligors, and another certain sum from himself, and that those payments, and nothing

less, were to acquit all. If he knew this and did not object or remonstrate, but allowed the matter to be concluded on that footing, or acquiesced in it, though tacitly, after it was concluded, and gave the confession and took the defeasance, shewing that the intention was that his co-obligors were to pay certain sums, and no more, and he to pay what the arbitrators decided and no more, and if he had reason to suppose that without his giving the confession the case must have gone on against him, we could not with any propriety interpose for the purpose of enabling him by the application of a strict technical rule of law to defeat what he had deliberately agreed to.

We think that, considering the position in which the defendant stood in regard to J. B. Baby, and virtually to the counties, in consequence of his liability as surety for Wood, and on his own account for the same monies of the district which were in question in all the suits, it would be most unreasonable that it should be in his power to avail himself of such a defence as he desires to set up.

And it is plain, we think, that signing the cognovit under the circumstances, and at the time he did, and with the understanding to which he has attached his signature, he has confined himself to his chance of the remedy, whatever that may be, which he is seeking in a court of equity.

I do not apprehend that the court of equity, which has a concurrent jurisdiction in such matters, would find themselves disabled from enquiring whether this is a case for relief; and if we thought they might do so, we should still abstain from setting aside the judgment or confession.

If the defendant did not know that a sealed release had been executed, it was only because he did not enquire into the particulars of what had been done.

He knew that the agreement was to release them in effect on certain terms, and as soon as he enquired he learnt the further fact of the sealed release, which was but a natural consequence of the agreement, and which it was not pretended was intentionally concealed from him.

There are other points in the case which militate against the application, but which we think it unnecessary to enter into.

Rule discharged.

Doe dem. Henderson v. Seymour et al.

Trespassers on Crown Lands—Ejectment by vendee of Crown—Agent's receipt for Land—Power of Government to cancel their contract with vendee after receipt—3 & 4 Vic., ch. 78, sec. 31; 4 & 5 Vic., ch. 100, sec. 18; 12 Vic, ch. 31, secs. 2, 3.

The plaintiff in 1846 purchased some Clergy Reserve Land from a government agent, and obtained from him receipts for partial payment. The defendants were then living on the land, and had been living there since 1840, having made valuable improvements. On the 2nd August, 1849, an order in council was made, that on defendants making the required payments, plaintiff's money should be returned to him, and the sale to him cancelled. When the present action was brought, an order of the Executive Council was made 6th August, 1850, recommending that the Attorney General be authorised to defend the suit.

Held, that at the time plaintiff received his first receipt from the government agent defendants being mere intruders on Crown Lands, he acquired a right to eject them under 12 Vic., ch 31, sec. 2, and that the Crown could not at its pleasure divest him of that right, nor change a wrongful occupant into a rightful occupant, to the prejudice of their own vendee.

(Q. B., T. T., 15 Vic.)

Ejectment for E. ½ of 27 in 3rd concession North of Egremont road in Warwick.

Doe dem. Henderson v. Westover.

Ejectment for W. ½ of 25 in 4th concession North of Egremont road in Warwick.

Doe dem. Henderson v. McCormick.

Ejectment for W. ½ of 27 in 3rd concession North of Egremont road in Warwick.

The case against Seymour was first tried. The plaintiff put in a receipt signed by Patrick McMullen, as crown land agent, dated at the Western District Agency, Sandwich, December 7th, 1846, for 28*l.* 10*s.* currency, received from the lessor of the plaintiff, being for the first instalments, "including the inspection fees, on the following clergy lots in the township of Warwick—viz., No. 27 in 3rd concession North of Egremont road, No. 25 in 4th concession North of Egremont road, and No. 27 in 2nd concession South of Egremont road." He produced also a receipt signed by the same crown lands agent, dated Western District Agency, Sandwich, 4th December, 1847, as follows—"Received from James Henderson, Esq. (lessor of plaintiff), a draft on George Thomas, Esq., agent Upper Canada Bank, Chatham, for the sum of 25*l.* 8*s.* 10*d.* to be applied to the payment of the second instalment" on the same lots as are specified in the first receipt.

This was the plaintiff's case, the receipts being relied on as sufficient evidence of title under our statute 4 & 5 Vic., ch. 100, sec. 18, which

by a subsequent act has been made to comprehend the case of vendees of clergy reserves.

For the defendant there was put in, 1st, an order in council, made 2nd August, 1849, approved of by His Excellency the Governor General, in which it was recited that Robert Seymour, Samuel McCormick, Richard Burdett, and Eleazar Smith of Warwick, had petitioned to be confirmed in the possession of Clergy Reserve Lots No. 27 in the 3rd concession, and 25 in 4th concession North of the Egremont road in Warwick, the said lots having been in their occupation during a number of years, with buildings and other improvements: that their application had been opposed by Mr. James Henderson (the lessor of the plaintiff), on the ground that the lots in question were sold to him by the district agent in December, 1846, and that he declined relinquishing his right thereto: that the opinion of the Solicitor General had been taken thereon, who had reported that he had considered the petition and papers, and was of opinion that the evidence established the occupation of the lands in question by the petitioners, and the existence of considerable improvements at the time of the sale to Henderson: that notification of such occupation and improvements had been made to the agent of government, whose conduct, viewed in the most favorable light, had been culpably negligent: that the injustice to the occupants by depriving them of their improvements would be so great, and bear so hardly on so many families, that he thought the option to purchase should be offered to the occupants, and that on their making the required payments, Mr. Henderson's purchase money should be repaid, and the sale to him cancelled.

The council recommended that the opinion of the Solicitor General should be approved and adopted, and an order of the Governor General in council was made accordingly, 2nd August, 1849.

There was also put in an order of the Executive Council, made 6th August, 1850, on the petition of Robert Seymour, Richard Burdett, and Erastus Westover, (Seymour and Westover being the defendants in two of these ejectments), stating themselves to have purchased under the order in council of 2nd August, 1849, and representing that two of them had been served with writs of ejectment at the suit of James Henderson, Esq., on the plea of his prior purchase, and the council recommended that the Attorney General should be authorized to defend the suits.

The defendant also put in a receipt dated 27th December, 1849, signed by the crown land agent, Mr. McMullen, acknowledging the payment of 14*l.* 15*s.* for two instalments, rent, &c., on east half of lot

27 in 3rd concession north of Egremont road in Warwick. This receipt is in fact a letter from the agent to Seymour, in which he also recommends him to arrange the matter with Mr. Henderson.

The learned judge (Sullivan) rejected the evidence offered by the defendant that he had been in possession of the land since 1840, and had built a house on it, and that he offered to purchase before the sale to Henderson, not thinking such evidence material.

It was objected by the plaintiff's counsel that what was shewn could not prejudice the plaintiff's right under his purchase made in 1846. The learned judge directed a verdict for defendant, reserving leave to enter verdict for the plaintiff, if this court should be of opinion that under the facts shewn, the defendant could be treated by the plaintiff as a trespasser under the 18th clause of 4 & 5 Vic., ch. 100, being in possession with the assent of the Crown, and whether such assent, not under the great seal, is sufficiently shewn under the orders in council.

The same evidence and the same questions apply in the three cases, and in each case a verdict was found for the defendants.

Galt obtained a rule *nisi* to enter a verdict for the plaintiff, or for a new trial, on the law and evidence, and for the reception of improper evidence, contending that the defendants were wrongful occupants, and not in privity with the Crown at the time the plaintiff received his first receipt from the government agent, by which his right to eject instantly accrued (12 Vic., ch. 31, sec. 2), and which no subsequent act of the government divested, and as they were not shewn to have been in possession in 1836 they were not protected by the statute (3 & 4 Vic., ch. 78, sec. 31).

Richards for Westover and Seymour, and *J. Wilson* for McCormick, shewed cause. They contended that government had a right to cancel the sale with plaintiff; also, that as government defended this action, in effect the action was against the Crown, and that the statutes (4 & 5 Vic., ch. 100; 12 Vic., ch. 31) could not apply to the Crown and overrule its acts. Those statutes only apply to wrongful occupants, which, as the government desired to maintain their possession, they cannot be considered; and that as against the Crown, the receipt plaintiff had received could not operate as a patent.

ROBINSON, C. J., delivered the judgment of the court.

These cases all turn upon the question whether the lessor of the plaintiff can avail himself of the 18th clause of the 4 & 5 Vic., ch. 100, and can maintain ejectment upon his contract of purchase and receipt for instalments against the defendants.

It is contended that he cannot, because the government before he brought his action (not before he made his purchase) had shewn a willingness to recognize the defendants as being occupants entitled to prëemption, and a disposition to protect them and to cancel their sale to the lessor of the plaintiff. This brings up a question of some nicety which we can only decide on reason and principle, without expecting to find aid from any case in point, because the state of things created by our statute is peculiar to this country. The Land Sale Act, 4 & 5 Vic., ch. 100, sec. 18, provides that when a purchaser of Crown lands has bought land from a district agent, he shall make his payments to the district agent, who upon the receipt of any purchase money shall give the purchaser a receipt in a certain form, which in these cases has been complied with; and that such receipt shall authorise the purchaser to take immediate possession of the lot so sold, and to maintain actions or suits in law or equity *against any wrongful possessor or trespasser on such land*, as fully and effectually as if the patent deed had issued on the day of the date of such receipt.

This provision has, by an act passed subsequently, been extended to the case of clergy reserves sold by the government.

Can the lessor of the plaintiff make use of the privilege of this clause against any of these defendants, considering the circumstances under which they stand? If he can, then he is clearly entitled to succeed, otherwise not, for he has had no previous possession to rely upon, and holds only his receipt, which, however, is equivalent to a patent, if he is at liberty to treat the defendants as wrongful possessors or trespassers.

It is clear, and has been so held in this court in several cases (*Doe Fitzgerald et al.* v. *Finn*, 1 U. C. R. 81, 82), that an intruder upon the lands of the Crown gains no seizin or privilege by his possession; that he continues a mere trespasser after the Crown has granted the land to another, as well as before, and may be proceeded against as such by the patentee, whose estate is complete without entry, notwithstanding such tortious holding by the intruder. In Bacon's Abridgment, Prerogative E. 6, the law in such cases is thus stated by Chief Baron Gilbert, "So there can be no tenant at sufferance against the King, but he who holdeth over is an intruder, because no laches can be imputed to the King for not entering. Therefore if the King be seized in fee of the manor of B. and a stranger erect a shop in a vacant plot of it, and take the profit of it without paying any rent to the King, and after the King grant over the mannor in fee, and the stranger continue in the shop and occupy it as before, this is no disseizin, but an intrusion on the King's possession, for that the King's title appears on record,

and the entry *in pais*, which is not an act of equal notoriety, will not divest it out of him. If then the King is not disseized, his conveyance of the freehold is good, and the grantee is seized by virtue of it, and consequently cannot be said to be disseized by the stranger who has made no entry on him after the King's conveyance, but only continued the old interest which he had before the grant, and so remains an intruder still, and liable to an action of trespass or ejectment for it."

It is not shewn, and I think is not asserted, that either of these defendants entered under any claim of right, or by any privity with the Crown, or that they were anything but mere intruders up to the time of the sale to the lessor of the plaintiff, when the district agent, on behalf of the government, made that contract with him and gave him that receipt, which the statute says shall give him the same right to maintain actions against any wrongful possessor as the King's patent could do.

There is nothing in the case to shew that the defendant in each case was not a *wrongful possessor* on the 7th December, 1846, when the lessor of the plaintiff paid the first instalment on his purchase, and took his receipt, or that he was anything more than what is familiarly called a squatter. If we are right in assuming that to be so, then, in my opinion, he was a *wrongful possessor*, whom the purchaser had acquired the right and power under the statute to eject.

It is true that the government *afterwards*, in 1850, upon a petition preferred to them by the defendants, manifested a disposition then to protect them, and to annul the sale; in other words, to revoke what the statute had as against wrongful possessors made equivalent to a patent. It is not shewn that this was by reason of any prior contract that had been made with the defendants, and that had been unfortunately overlooked, or because their possession had been in any manner authorized or recognized at any time by the government, but only because, entering for all that appears without right, they had been in occupation for several years, and had made large improvements. As between individuals, this would make them not the less wrongful possessors and trespassers; and in contemplation of law, they must be at least as much so as regards the Crown. It has, I confess, the appearance of being a perversion of sound principle, and detrimental to morality, to afford to wilful trespassers the privilege of a prëemption right by reason of their illegal occupation. It would have been better, perhaps, if it had been always a maxim that a mere intruder, instead of being the person who should in preference to all others be allowed to acquire a title, had been always made to understand that a grant would

be made to any one rather than to him. But, from considerations which were thought to justify it, the opposite policy of favoring these intruders has been generally, I believe, the policy of the government in this province for a long time, if not from the first.

Here, however, it comes in conflict with what the statute law has made a legal right. I think there is nothing whatever before us to shew that the intention to sell to these particular occupants, and the assent to their occupation, were not both after the 7th December, 1846, when the receipt was given to the lessor of the plaintiff; and the Crown could not, in my opinion, at its pleasure divest the right which it had granted, and not as an act of bounty, but for a valuable consideration.

The government has not a discretion to change a wrongful occupant into a rightful occupant to the prejudice of their own vendee. If up to the time of the sale to Henderson the Crown had not authorized the occupation of the defendants, then they were in fact wrongful possessors; and continuing so up to and after the time of the date of the receipt, we see no legal principle on which we can hold them not liable to be treated as such by the *bona fide* purchaser. We are not determining what the Crown may or may not have it in its power to do for cancelling its contract with Henderson, and putting an end to its legal effect as regards his rights, and the rights of others; but, as the matter stands, we consider that we cannot deny the plaintiff's right to recover against these defendants on producing his receipt, and in the absence of fraud.

The argument on the other side is, that the government, being now willing to protect the possession of the defendants against the consequences of their own sale to Henderson, they are no longer trespassers or wrongful occupants within the intention of the act, and that Henderson must be looked upon now as using his receipt against the government rather than against "wrongful possessors," since the government has taken upon itself the defence of these ejectments. We cannot say that any such legal consequences can be deduced from the mere fact of the willingness of the government in 1849 to maintain them in possession. The holder of receipts upon crown sales has, under the statute, acquired legal rights which it would be dangerous to disregard, and which we think we have no authority to disregard; for we cannot tell what interests and arrangements may in such cases have been acquired under the receipts in which the public are entitled to place confidence, at least when they have not been obtained by any fraud. Inconveniences and injury, on the other hand, may follow from the statutes 4 & 5 Vic., ch. 100, sec. 18, and 12 Vic., ch. 31, secs. 2 and 3, if the discretion of the

Crown in dealing with inchoate rights to public lands is held to be thus diminished; but we cannot legislate in order to guard against such inconveniences.

The statutes have, to a considerable extent, interfered with the control which might always have been exercised before, so long as the patent had not been granted. Whether such enactments are on the whole prudent and beneficial, or otherwise, as they stand, is to be considered elsewhere. There can be no other question in these cases, except this—whether the assent of the government in 1849 to allow these defendants to continue in possession, and their order in council cancelling the sale, disables the former purchaser, who has paid his money, from treating them as trespassers and wrongful occupants.

If he had paid all his purchase money and obtained his patent, he could undoubtedly treat them as trespassers; for they have no right acquired before his which they could set up against him; then, if he cannot eject them upon his receipt, he cannot "maintain his suit against the person who undoubtedly is as to him a wrongful possessor as fully and effectually as if he had his patent."

It might have been well if the act had contained a provision reserving to the government a right of control until the patent should issue, by providing that in case they should at any time before the patent should issue recognize the possession of any person to be rightful, it should not be competent to their vendee to treat such person as a trespasser under the statute, but we do not think there is any such reservation implied.

So far as the regulations which have been made by orders in council respecting the sale of clergy reserves bear on these cases, they do not make in favor of the defendants; for they shew that the government do not by their rules contemplate the confirming any possession which was originally taken without authority, unless it had been held five years before the 1st January, 1841, nor unless such occupant should apply to be allowed to purchase before the 1st January, 1847. The case is required to come within both of these conditions, and these cases before us come within neither, according to the evidence.

I have felt that the question, now for the first time brought up, required to be carefully considered on several accounts. The late statute, 12 Vic., ch. 31, sec. 3, extends to the privilege of maintaining actions before patents issue to the holders of location tickets, or licenses of occupation; but the legislature there were careful to reserve to the Crown a proper control over the grant, for they only give to the holders of such tickets or licenses this right, "*so long as the location ticket, or*

license of occupation, be not revoked by an order in council." By making no such reservation in regard to vouchers granted upon sales, they seem to have considered that the government should not have a right at their pleasure to undo a sale by an order in council any more than an individual can. It seems to have been intended that in such cases where there has been anything wrong, which should vitiate the contract, the Crown should be left to its legal remedies for annulling it. And this would seem reasonable, because if a purchaser, after paying one or two instalments, is exposed to the chance of having his purchase annulled, and the land sold to another, merely because the government is willing to overlook what was really an act of trespass, and to recognize a claim to indulgence which it was not bound to recognize, the same thing might be done after he had paid his ten instalments, and had involved himself in liability to others, relying on his title being confirmed.

No doubt the government in these cases before us were displeased that their agent had been inattentive as it seemed to the fact, which he might or ought to have known, of the possession held by these defendants; and though it not does appear from what is before us that he could have known anything which would have shewn him that his sale of the lands to the lessor of the plaintiff was wrong in itself, or contrary to the regulations of the government, yet they are willing to save the defendants from the hardship of losing their improvements, though illegally made—but I think that nothing which they did with this view could annul the effect given by the statute to their receipt held by the vendee as evidence of his title.

And my opinion is, therefore, that in each case the verdict should be entered for the plaintiff.

DRAPER, J.—The 4 & 5 Vic., ch. 100, sec. 18, provides that the local agent for the commissioner of crown lands should give receipts to purchasers, specifying the number of the lot, or the land purchased; "and such receipt shall bear date on the day on which it is actually signed, and shall authorized the purchaser to take immediate possession of the lot so sold; and to maintain actions and suits in law or equity against any wrongful possessor or trespasser on such land as fully and effectually as if the patent deed had issued on the day of the date of such receipt."

This statute, however, extends only to the sale of crown lands; not to clergy reserves.

The imperial statutes 3rd & 4th Vic., ch. 78, sec. 1, authorizes the Governor of Canada, by and with the advice of the Executive Council, and

under such regulations as might be by him from time to time in council established in that behalf, and approved by the Queen in council, to sell, grant, alienate and convey in fee simple, all or any of the clergy reserves.

Under this act, the governor, with the advice of the Executive Council, made certain regulations, which on the 21st October, 1841, and the 10th December, 1842, were approved by the Queen in council; by which the commissioner of crown lands was appointed to act in the sale of clergy reserves. The 4th regulation provided for the inspection of the reserves to be returned upon oath, such returns to shew whether the reserves were occupied, improved or vacant, and if occupied or improved, by whom, or under what authority or claim, if any be asserted —the extent, nature and value of the improvements; the value of the land apart from such improvements, the nature of the soil, and such other circumstances as may affect the valuation. By the 5th the governor in council was authorized to approve, alter or annul returns. The 6th provided that parties considering themselves aggrieved by the returns might have their cases considered, on petition to the governor in council. The 7th was, "That upon the confirmation of any such return, the same shall be communicated to the commissioner, of crown lands, and the land contained in each return shall be *considered open for sale*, at the price stated in such return, as confirmed, *including the value of the improvements*, to the first person who shall apply for and pay the same." The 9th was, that where any reserves shall be offered for sale which have been leased, or where any reserves offered for sale shall have been improved without authority, for the space of five years next before the 1st January, 1841, the agent for the sale shall allow privilege of preëmption to the lessees or their assignees, "in case there shall have been no lease to occupants for the space of twelve calendar months after such land shall have been offered for sale." And in case of any sales to such lessees or occupants, interest on the purchase money at the rate of six per cent. per annum shall be added thereto from the time the lease expired, or if no lease, from the time of such occupation, as the same may be reported by the inspectors; and the value of improvements made upon such lands shall not be charged as part of the purchase money. No. 10 provides for the payment of the purchase money—two-sixth down, the residue in four equal annual instalments, with interest; the first instalment to become due on the 1st of January next after such sale. Any purchaser to anticipate the time of payment. By the 11th, the agents of the commissioner of crown lands are to effect sales and receive monies. By the 13th, on production of the

agent's receipts at the principal office, the amount shall be credited on the purchase; and on payment in full the commissioner shall certify the same, and letters patent shall issue to the purchaser. A notice was given in the *Gazette* of 31st January, 1846, that the disposable clergy reserves in the Western district would be open for sale on and after the 10th March, 1846, on application to the resident agent, Patrick McMullen, Esq., and the above regulations Nos. 9 & 10, were appended to that notice.

On the 14th March, 1846, notice was given that by a recent order in council the following alterations had been made in the sale of the reserves: 1st. One-tenth of the purchase money in hand, the remainder in nine equal annual instalments, payable as before, on the 1st January. 2nd. On lots occupied without authority, in place of interest as required by the late regulation, rents to be charged at fixed rates given. 3rd. The privilege of preëmption granted by late regulations to lessees and their assignees whose leases expired previous to the 1st January, 1841, as also to occupants without authority prior to the same date, shall not be considered to extend to such lessees or their assigns, or *to such occupants as do not on or before the 1st of January*, 1847, *make application* to the crown land commissioner for the purchase of the clergy lots which they respectively occupy, *and who do not on or before that day pay all rents which may be due* according to the present regulations.

On the 8th April, 1846, sale of clergy reserves in Upper Canada were suspended "for the present;" and I do not find public notice of its being resumed.

The provincial statute 12 Vic., ch. 31, sec. 2, extends the 18th section of 4 & 5 Vic., ch. 100, and declares that said section shall be deemed at all times to have extended to sales of clergy reserves, crown reserves, school lands, &c., &c. The language of the third section tends strongly to shew in what case the governor in council could exercise a power of revocation.

It did not appear that the present defendant, though an occupant, as was stated in the agreement in 1841, was so for five years next before the 1st January, 1841, so as to acquire a right of preëmption under the 9th regulation; nor did it appear that he was entitled to the protection of regulation No. 3, of 14th March, 1846, for he made no application before the 1st of January, 1847, for purchase; nor is it asserted that he on or before that day did pay the rents due, according to the regulations, for his past occupation.

On the other hand, we must, I think, assume that an inspection took place under No. 4 of the first set of regulations; that the return was

approved under the 5th of these regulations, and was communicated to the commissioner of crown lands, according to the 7th of the same regulations; under which, if so, the land would be open for sale. And as under regulation No. 11 the agent had power to sell and give receipts, the lessor of the plaintiff, at the date of his purchase and payment of his first instalment, became the purchaser under the imperial statute, and the regulations made in conformity therewith, and under the provincial statutes 12 Vic., and 4th & 5th Vic., entitled to immediate possession, and to maintain actions and suits against any wrongful possessor or trespasser, on such land, as if he had a patent deed.

Then, is defendant a wrongful possessor or trespasser? I cannot presumed that he was not when the agent sold the lot to the lessor of the plaintiff, and received the first and second instalments of the purchase money.

I cannot bring myself to the conclusion, that after such a sale, and under the facts established, the defendant is not a trespasser as against the lessor of the plaintiff, by reason of the order in council. The sale made under the statute, and the regulations made under its authority, and therefore *quasi* part of the statute, giving a title as against any person in possession who can shew no title of earlier date, or at least bring himself within those provisions and exceptions of the regulations which would shew he was not a wrongful possessor: and I do not think an order in council can either revoke the statutory effect of the receipt, or give a new and different character to the occupation.

BURNS, J.—The statute 4 & 5 Vic., ch. 100, sec. 18, enables the vendee of the crown to maintain an action of ejectment against any wrongful possession of a trespasser upon such lands as the crown, through its agent, may sell; and the provisions of this statute being extended by 12 Vic., ch. 31 to the clergy lands, and the land in question in this action having been sold under the provisions of the 3 & 4 Vic., ch. 78, regulating the disposal of the clergy lands, two questions present themselves for determination—first, whether on the 7th December, 1846, the date of the sale to Mr. Henderson, the defendant was in the wrongful possession of the land: and secondly, if he were, whether the Executive Council could by order in council cancel the sale to Mr. Henderson, and authorize a sale to the defendant; or whether an order in council could confer a right upon the defendant to successfully resist the plaintiff's action.

It is not shewn that the defendant did, or that in fact he could, claim the provisions of 3 & 4 Vic., ch. 78, as operating in his favor; on the contrary, he had no right of preëmption, and therefore the land was to

be sold to any one who chose to become the purchaser. The defendant has no cause of complaint that he was deceived in any way—his complaint must lie against himself, that he went upon the land trusting to chances in his favor, or that he was negligent of his own interest. If he had any equitable cause for a claim, he was certainly liable to be ejected by the crown at any moment; and in this position, without any expressed desire on his part to become the purchaser, for anything we see to the contrary, the Crown sold to Mr. Henderson, who appears not to have known the land was occupied in any way. Mr. Henderson paid the instalment of his purchase, and took the agent's receipt; and from that moment the act of parliament began to operate in his favor, and conferred upon him certain privileges. On the facts proved it is impossible to hold otherwise than that the defendant was a wrongful possessor of the land at the time of the sale, and that Mr. Henderson then was by virtue of the act entitled to the immediate possession; and, if there were nothing else in the case, there could be no room for argument.

The next question is, whether there has occurred anything since, which displaces the rights Mr. Henderson so acquired by virtue of the act of parliament. The defendant petitioned the Executive Council in 1849 on the subject, to be confirmed in the possession of the land, and upon the report of the Solicitor General the Council on the 1st August, 1849, authorized that the option of purchase should be offered to the defendant, and that if he made the required payments, then that Mr. Henderson's purchase money should be returned to him. It appears the defendant availed himself of this; but Henderson's money was not returned to him. No complaint is made against Mr. Henderson in any way; but the Council were guided by the Solicitor General's report, which says that the agent's conduct was most culpable, viewed in its most favorable light, as respects the defendant. After the lessor brought his ejectment, the Council directed by order that the Attorney General should be instructed to defend. Nothing is said in the order of council about cancelling the sale to Mr. Henderson; but is it to be looked upon, if valid in any way, that a compliance by the defendant with the terms, that the fact of such compliance virtually cancels the sale to Mr. Henderson? Suppose the defendant had never complied with the terms, was the sale to Mr. Henderson then to stand good? Were the rights which the statute conferred upon him, subject to be divested upon the defendant complying with the terms of the order in council? These questions suggest themselves upon the idea that the order in council was intended to confer a new right upon the defendant,

not that a right existed which the council only intended to recognize; for it is not pretended that the defendant had any rights which rendered the sale to Mr. Henderson illegal in any way; and therefore the order in council can have and in fact has no reference back to anything beyond the 7th December, 1846, which would or could prevent the operation of the act of parliament in Mr. Henderson's favor. It was recommended, and the order in council is, that upon the defendant making the required payments, in case he exercised the option of purchase, Mr. Henderson's purchase money should be returned to him. It is clear that the sale then to Mr. Henderson was but conditionally revoked, and that he became vested with all the rights conferred by the act of parliament in the mean time. Whether, since the statute, the crown can conditionally or otherwise revoke a sale once made, is not the question to be decided in this action: that may be contested by the crown taking proceedings to dispossess the vendee under the contract; but the true question here is, whether the crown can clothe an occupant with an authority to resist a right conferred by an act of parliament. The defendant has claimed before the council an equitable right, which the crown endeavours to sustain by stating that upon the occupant complying with certain terms a sale shall be made to him, and that the Attorney General be instructed to defend the action. Now, if the government could sell to the defendant after selling to Mr. Henderson, of course the sale could have equally been made to any other person; and I see no reason for arguing that the second vendee would be clothed with any of the rights conferred by the statute—most certainly not as against the first vendee. Then, in what other situation does the defendant stand here? He is the second vendee, because it is said there are equitable circumstances in his favor. Can the crown, if it cannot confer a right upon a second vendee to dispossess a first vendee, confer a right to resist an action which is given by act of parliament? The order in council must be reduced to this effect, for it can have no other, as it seems to me, and then the question is simply this—whether the crown, notwithstanding the provision of the act of parliament, retains a power to authorise an occupant to resist an action. If the patent had actually issued at the payment of the receipt, the case would never have been argued; and what difference can there be when the statute says the purchaser may bring his ejectment as fully and effectually as if the patent deed had issued on the day of the date of the receipt.

Whatever right the crown may have to avoid the contract entered into with Mr. Henderson, or to resist the performance and fulfillment of it with him; it is perfectly clear to me that to hold that the crown

could, either from equitable circumstances connected with the occupant of the land, or from the culpable negligence of their officers, in which the purchaser did not in any way participate, or was accessory to, authorize the resistance of legal or equitable proceedings by those who at the date of sale were in wrongful posession, would be subversive of the act of parliament. (*a*)

I think the defendant was a wrongful possessor of the lands in question; and that nothing has occurred since the purchase by the lessor of the plaintiff which prevents him from maintaining the action of ejectment against the defendant.

Per Cur.—Postea to plaintiff.

MONTREAL MINING COMPANY V. CUTHBERTSON.

Foreign judgments—Pleading—Want of process—Montreal Mining Company—Liability for calls—Penalty for not paying.

The first count of the declaration was on a judgment of the Superior Court of Montreal.

Defendant pleaded that *he was not at any time served with any process* issuing out of the said court, at the suit of the plaintiffs, for the causes of action for which the said judgment was obtained; nor *had he at any time notice of any such process;* nor did he appear in the said court to answer the said plaintiffs: *Held bad* on demurrer, inasmuch as the pleading did not shew that the proceedings were so conducted as to deprive the defendant of the opportunity of defending himself.

The second count was for calls on certain shares in the stock of the said company.

Plea—that defendant was not at the time of action brought, nor is he, the holder of the said shares or any of them: *Held bad* on demurrer, inasmuch as it assumed that if a person ceased to be a stockholder after the call was made he would no longer be liable; whereas the provision in the statute 10 & 11 Vic., ch. 68, sec. 18, is expressly otherwise.

(Q. B., T. T., 15 Vic.)

Assumpsit—1st count on a judgment obtained by plaintiffs against defendant in the Superior Court of Montreal, by reason of the non-performance by defendant of certain promises, and for a penalty and for costs, &c.

2nd count, for calls on certain shares in the stock of the said company.

Second plea to 1st count—that though the said judgment was in fact obtained by the plaintiffs against the defendants, he the defendant was

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(*a*) The declarations of the Court in this case are very strong, and are rarely to be met with. The peculiar prerogatives of the Crown exempt the Sovereign from the application of the rules of law affecting contracts generally. "The Crown can do no wrong. The Crown cannot be guilty of laches. Time does not run against the Crown;" are well known maxims. But generally, it is held that (except where specially named) the Crown, may act "*without regard to legal forms, or to the strict letter of the law, or legal rules of evidence.*"

not at any time served with any process issuing out of the said Superior Court of Montreal, at the suit of the said plaintiffs, for the causes of action upon which the said judgment was obtained as aforesaid, nor had he at any time *notice of any such process;* nor did he, the defendant, at any time appear in the said court to answer the plaintiffs in the said action on which the said judgment was so obtained.

Demurrer to the 2nd plea—assigning for causes that it is not alleged in the said second plea that the judgment mentioned in the said 1st count was irregularly obtained or was irregular or void; that it is not denied that the said judgment is still in full force and effect; that all the facts in the said plea alleged may be correct, and yet the said judgment be regular, &c.

Demurrer to third plea—assigning for causes that the said 3rd plea puts in issue an immaterial allegation in the second count of the plaintiff's declaration—to wit, that the defendant was the holder of the said shares at the time of the commencemont of the said suit—whereas, if the defendant were the holder of the said shares at the time when the said calls were so made, he is liable therefor; and in that the said third plea is no answer to the 3rd count of the declaration, and contains an immaterial issue, &c.

Prince, for the demurrer, referred to *Becquet* v. *McCarthy* (2 B. & Ad. 951), and *Douglass* v. *Forrest* (4 Bing. 686), as supporting the demurrer to the second plea; and the statute 10 & 11 Vic., ch. 68, sec. 13, as sustaining the demurrer to the third plea.

J. Wilson, contra, cited *Fergusson* v. *Mahon* (11 Ad. & E. 179), and objected to declaration on the ground that the style of the foreign court was not set forth.

ROBINSON, C. J.—The pleas demurred to are both bad, I think.

The second plea, although it does not conform to a precedent to be found in Mr. Chitty's work, has been adjudged bad in several recent cases, because it assumes that if the defendant was not served with process, and had no notice of process, and did not appear, it must necessarily follow that the judgment was rendered against him contrary to natural justice—as being rendered against a man who had no opportunity of being heard and no means of defending himself; but the inference that the defendant had no opportunity of defence, does not follow from what is stated in the plea, since he may have had notice of the proceeding—that is, of the action going on, and all the notice he could have required, and that the nature of the case gave him any reason to expect or any motive for desiring.

He may have accepted declaration without process, or the proceeding in this foreign court may not be commenced, as in ours, by any writ. The defendant should have denied notice or knowledge of the proceeding. In *Cowan et al.* v. *Braidwood* (1 M. & Gr. 882; 2 Scott, N. R. 138), and *Rynolds et al.* v. *Denton* (3 C. B. 187), there are express decisions shewing this plea to be insufficient.

The 3rd plea is also bad; for it assumes that if a person ceases to be a stockholder after the call has been made upon him, he can no longer be sued upon the call; but the statute is expressly otherwise, though in one part of the 13th clause there is an inaccuracy of expression which is remedied in a subsequent part of the clause.

The language of the clause clearly shews that it will be sufficient if the person sued shall be shewn to have been a shareholder at the time of the call, and it would be unreasonable if it were otherwise.

The defendant took some exception to the plaintiffs' declaration, though I find no note made on the demurrer book of his exceptions. We do not however find any substantial defect in the declaration.

It was very informal, no doubt, not to mention the style of the foreign court in which the judgment was obtained; but any exception on that ground is cured by the defendant's pleas, for he clearly recognizes the judgment to which the plaintiffs refer, and objects only to the manner in which it was obtained.

Whatever doubt there may be about the right to recover a penalty of ten per cent. for not paying the call (which depends on the right of the corporation to make such a by-law), that, as was remarked by the plaintiffs' counsel, only goes to a part of the cause of action for which the plaintiffs are suing, and could not therefore entitle the defendant to judgment on demurrer, notwithstanding his pleas are bad.

If the case were otherwise in this respect, we should have had to consider whether we could properly, under the circumstances, examine into the particulars of the judgment upon the merits; but, as it is, there is no reason why we should go into that question.

DRAPER, J.—In *Reynolds* v. *Fenton* (3 C. B. 187), a similar plea to the 2nd was held bad. Tindal, C. J., says, it does not shew substantially that the defendant "had no means of being present in the Belgian court whilst the proceedings were going on against him therein." And Maule, J., distinguishes *Ferguson* v. *Mahon*, which was in debt on a judgment in the Common Pleas in Ireland, by saying, "The court there could take judicial notice that the law of Ireland is the same with the law of this country with regard to the commencement of this suit

by process;" but how do we know what is the mode of commencing a suit in Lower Canada? (*a*)

The 3rd plea is obviously bad; for it does not deny that the defendant was the holder when the calls were made, and his making a transfer afterwards would not discharge him from liability for such calls. The 13th section expressly provides that in order to maintain any such action it shall be sufficient to prove by one witness *that the defendant, at the time of making such call, was a shareholder, &c.*

I do not at present think the plaintiffs had any right to make a by-law such as is stated in the judgment in the first count, imposing a penalty of ten per cent. for not paying calls when due. It is very easy to perceive that this is indirectly enabling the plaintiffs to recover sixteen per cent. on the amount of calls for the first year; and the language of the act, while enabling the plaintiffs to forfeit shares, does not say a word about imposing penalties. But this is no ground for holding the declaration bad, or for discharging the defendants from the *whole* demand.

BURNS, J., concurred.

Per Cur.—Judgment for the plaintiffs.

DOE DEM. MCGILL V. LANGTON.

By-law imposing tax on wild lands—Sale of land for arrear of such taxes—4 & 5 Vic., ch. 10.

The Municipal Council of the district of Colborne passed a by-law, imposing a tax *per acre* on unoccupied or wild lands, for the purpose of improving the roads and bridges, and liquidating the debt of the district. *Held*, that the by-law was bad, inasmuch as the council had no power to impose a tax for repairing the roads and bridges generally, nor to confine such tax to unoccupied lands only, nor to impose a tax of so much per acre, instead of an assessment of so much in the pound on the assessed value, and the land having been sold for arrears of such taxes, in addition to arrears which had accrued under the statute; *Held*, that the sale was nevertheless void, and that the sheriff's deed was inoperative and conveyed no title.

(*a*) By the act 7 Vic., ch. 4, sec 1 (Con. Stat. Canada, p. 33), it is enacted that "any copy of the Statutes and Ordinances of the late Province of Lower Canada, printed and published by the printer duly authorised to print and publish the same, by Her Majesty or by any of her royal predecessors, shall be received as conclusive evidence of the several statutes made and enacted prior to the union of provinces of Upper and Lower Canada, by the Legislature of the Province of Lower Canada, and of the tenor of such statutes or ordinances in any court of civil or criminal jurisdiction in Upper Canada." As to the acts of the Legislature of Canada, it is also provided (Con. Stat. Canada, p. 81), "All copies of such Acts, public or private, printed by the Queen's Printer, shall be evidence of such Acts and of their contents."

Quære, whether the district council could direct land to be sold for payment of taxes, imposed not by the provincial statute but by their by-law?

(Q. B., T. T., 15 Vic.)

Ejectment for lot 10 in the 1st concession, township of Belmont, county of Peterborough.

Demise laid the 1st of January, 1851.

Plea and consent rule by present defendant.

Lease, entry and ouster confessed.

It was admitted that the lot in question was sold for arrears of taxes by the sheriff of the county of Peterborough (then the district of Colborne), on 3rd October, 1849, and that the defendant became the purchaser at such sale, and is now possessed thereof as vendee of the sheriff: that long before and at the time the lessor of the plaintiff was seized of said lot in fee, and if not barred by said sale, is still the lawful owner: that said lot was always, up to and at the time of the sale, unoccupied, and up to the time of the sale there was no sufficient distress thereon: that said lessor resided out of the district; and that the lot was a surveyed lot, and returned as unoccupied by the treasurer of the district: that on the 11th of November, 1842, the Municipal Council of the district of Colborne, passed a by-law in the following words:—

"A by-law to make provision for levying rates and assements on lands and other ratable property throughout the district of Colborne.

Passed November 11th, 1842.

"Be it therefore enacted by the Municipal Council of the District of Colborne, in Council assembled:—

1. That for the purpose of raising a sufficient sum of money to meet the expenses of this district, the sum of one penny per acre be assessed and levied on lands within this said district, in lieu of the taxes heretofore imposed by law.

2. That for the like purpose (in lieu of the present rate of assessment imposed by law) the sum of two pence in the pound be levied on all ratable property (except lands) in this district, according to the rates now established by law.

3. That the said rates be levied and collected by the collectors of the townships, and paid over to the treasurer of the district, as is by law required.

4. That for the purpose of improving the roads and bridges, and liquidating the debt of the district, there be raised and levied on all lands unoccupied and not included in the assessment roll in lieu of the present wild land tax, the sum of one penny per acre, which said sum of one penny per acre, with any increased rate as is hereafter provided, shall be equally proportioned towards the erection, maintaining or keeping in repair any new or existing road or bridge in the township in which such sum has been raised, and the liquidation of said debt of the district.

5. That when the rates and assessments upon any piece or parcel of land shall be suffered to remain in arrear and unpaid for the space of two years, the rate and assessment shall be increased to one penny half-penny per acre for each and every year the said rate and assessment shall remain unpaid.

6. That the rates and assessments hereinbefore directed, be levied in the manner now prescribed by law.

7. That the sum to be raised in any one year during the continuance of this by-law, shall be limited to 4,000*l.*; and that in case the said rates assessed within the district shall in any year exceed the sum of 4,000*l.*, then and in such case the said rates shall be apportioned and assessed equally upon all the said property, and reduced accordingly.

8. That this by-law shall commence and take effect on and from the 1st day of January, 1843.

(Signed) G. A. HILL,
Warden.

The lot in question was sold for taxes claimed to be due from and after the 1st July, 1840, to 1st July, 1848.

The taxes from 1st July, 1840, to 1st January, 1843, were imposed by the Quarter Sessions, under 50 Geo. III., ch. 7; after the rate of one-fifth of a penny per acre, together with one-eighth of a penny per acre under 59 Geo. III., ch. 8.

The above by-law professed to come into effect on and upon the 1st January, 1843.

Under this by-law one penny was imposed per acre for the years from 1st January, 1843, to 1st July, 1848.

No more than one penny per acre had been levied since 1st January, 1843.

The amount of each year's taxes, including the increase for being in arrears, stood as follows, for 200 acres:—

From 1st July,	1840,	to 1st July,	1841	£0	8	0
" "	1841,	"	1842	0	8	0
" "	1842,	"	1843	0	12	4
(The first six months under Statute, the last under By-law).						
" "	1843,	"	1844	0	16	8
" "	1844,	"	1845	0	16	8
" "	1845,	"	1846	0	16	8
" "	1846,	"	1847	0	16	8
" "	1847,	"	1848	0	16	8
Arrears in all				£5	11	8

The said lot was advertised for sale 1st of July, 1848, and sold 3rd October, 1849. No question arose on the mode of advertising; or of authority given to the sheriff; or on the details of sale, &c.

The lot was sold under the authority of the district council, and for arrears of taxes as aforesaid, claimed under said by-law; and it is the validity of a sale for taxes under the rate of assessment imposed by that by-law that is now in question.

Hagarty, Q. C., contended that the sale to the defendant was illegal and no estate passed thereby: that the by-law was wholly inoperative and void, and an excess of authority on the part of the council: that this by-law did not direct what part of the sum proposed to be raised should be borne by the land; nor in any way settle or shew the amount necessary to be raised on an equal assessment of all assessable land: that the by-law did not distinctly state the purposes for which the same was passed, or such assessment required, nor the sum required to be raised thereunder: that the by-law, especially in the 4th section, directed a levy of one penny per acre, for purposes wholly unfixed, and vague as to the amount required: that there was no power given to enforce the rates imposed by the council, by sale of the lands, nor did such by-law shew how such rates were to be recovered: that the by-law was contrary to law in assessing land at so much per acre, and not imposing a rate on its assessed value stated; nor whether the sum per acre might not be more than two pence in the pound on assessed value.

D. B. Read, for the defendant, contended that the by-law in question was legal; and the taxes thereby imposed such as the council had power to direct should be raised and levied: that too much was directed to be raised and levied by the by-law, or the sheriff directed to sell the land for the purpose of levying a greater amount of taxes than the council had a right to impose, the sale of the land was legal, and the purchaser acquired a good title; if there was some amount of taxes in arrear, subjecting the land to be sold for non-payment thereof, though not the amount the sheriff was directed to make: that the title of the purchaser was good—the by-law not having been quashed or rescinded, and the authority given to the sheriff not having been moved against or set aside.

If the court should be of opinion that under the facts the lessor of the plaintiff was entitled to recover in this action, it was agreed that there should be judgment as by confession entered for him, with one shilling damages.

If the court should be of opinion that the defendant was entitled to judgment, then a nonsuit should be entered.

ROBINSON, C. J., delivered the judgment of the court.

As connected with the question raised by this special case, I have found it material to refer to the statutes 59 Geo. III., ch. 7, secs. 2, 7, 14, & 15; 59 Geo. III., ch. 8, sec. 3; 6 Geo. IV., ch. 7, secs. 7 & 8; 4 & 5 Vic., ch. 10, secs. 39, 41, 42, 51, & 57; 12 Vic., ch. 81, secs. 41 (pt. 22), 155, 156; 13 & 14 Vic., ch. 67, secs. 6, 11, 12, 46; 14 & 15 Vic., ch. 109, schedule A, No. 21; 14 & 15 Vic., ch. 110, sec. 6, as well as the by-law itself, of which the validity is impeached.

Some of the statutory provisions which I have just referred to are no further than material to the decision of any question now raised, than as they may serve to throw light upon the intention of the legislature in their former provisions.

The case submitted to us has been fully and carefully stated.

On examining the by-law of the district of Colborne of 11th Novembe, 1842, it seems too clear to admit of doubt, that it was one beyond the competence of the district council to pass; and if so, it cannot be held valid for the purpose sustaining any proceeding which depends on its legality. The fact that it has not been quashed nor complained of within any limited time, would not make it binding, for even in regard to by-laws that may be passed and specially promulgated under the late act 14 & 15 Vic., ch. 109, their not being moved against within a certain time and quashed, will only establish their validity, "*so far as they shall ordain or direct anything within the proper* competence of the corporation to ordain or direct.

The legislature has been careful to insert that qualification, which, if they had been silent in respect to it, we must still have implied, or the most monstrous confusion and injustice might have followed.

The district council of Colborne when they passed their by-law, were acting on the authority given them by the statute 4 & 5 Vic., ch. 10, but they disregarded its provisions, and executed their delegated authority in a manner contrary to that law, as well as to the existing assessment laws of the province.

It is not perhaps necessary for disposing of this case that we should absolutely determine the point, whether a by-law so general in its terms as this is with regard to the objects to be accomplished by it, can be held legal; but I incline to think that the 4 & 5 Vic., ch. 10, sec. 39, required, that when the councils resolve to raise money for making or repairing a road, they should in the same or some other by-law, specify the particular road which they intended to make or repair, and the sum of money which they intended to raise for the purpose; for otherwise there could be no basis for their calculation, and no means of making that apportionment which the law required.

And I am quite clear that they had no power to pass a by-law levying a tax, not for making or repairing certain roads or bridges only, nor for making or repairing roads or bridges in any one year, but generally, "for improving *roads and bridges*," and confining the burthen of such tax to unoccupied lands only; nor could they legally throw upon unoccupied lands alone a tax not only for the year, but perpetual, for liquidating the debt of the district.

Nor could they legally impose, as they assumed to do, a tax of so much per acre, instead of an assessment of so much in the pound on the assessed value. I consider the intention and effect of the 4 & 5 Vic., ch. 10, secs. 39 & 41, to be, that the council having determined to raise a certain sum for a certain purpose within the scope of their authority, were bound to raise the sum by assessment to be laid on equally by a rate proportioned to the value assigned to each description of taxable property by the existing law, and that their rate should either bear equally on all descriptions of property assessed, or if they pleased they might make a special provision in regard to the land, not the unoccupied land merely, *but all the land*, to this effect, of the specific sums to be levied for the year, for the particular purposes described in their by-law, they might assign a specified portion—that is, a certain amount in pounds and shillings—to be raised upon the land (*i. e.* all the land in the district); which sum must be raised by assessing it at so much per pound, as might be necessary, on the estimated value of such land, as fixed by law for the purpose of taxation, taking care that all their rates on land for the year for all purposes should not exceed 1½*d.* per acre.

Instead of following the direction plainly given by the act, this by-law imposes on wild lands alone, not on all the lands of the county, a tax per acre, not a rate per pound, on the value of the acre, as fixed by law, which tax is raised not for any particular purpose so defined, that it can be seen whether one hundred pounds is to be raised or ten thousand, but for the purpose "of improving the roads and bridges, and liquidating the debts of the district;" the one object being indefinite in its nature, because it might absorb an expenditure of hundreds of thousands of pounds continued through generations; and the other, as to public debts, being equally undefined in the by-law, though necessarily in its nature capable of being ascertained as to amount. But the effect of this by-law is to throw upon the proprietors of unoccupied lands the whole burthen of improving the roads and of paying the public debt—a provision as clearly unreasonable as it is illegal. Then the by-law limits the sum to be raised in any one year to 4,000*l.*

But if, without making any questionable distinctions between unoccupied lands and other lands, and without deviating from the law of the land in taxing by the acre, instead of by a rate on the assessed value, not to exceed in the result so much per acre, the district council had passed a by-law laying a perpetual burthen on all the ratable property of the district of 4,000*l.* per annum, to meet the expenses of the district, and to make and repair roads and bridges, and to liquidate the public debt,

I think such a law, though free from several exceptions to which this law is liable, would still have been inconsistent with the letter and spirit of the statute 4 & 5 Vic., and of our assessment laws, and therefore void.

But then it is to be considered, that in this case the land has been sold not entirely to make the tax imposed by this by-law, which we must hold to be illegal, but that 28*s.* out of 5*l.* 11*s.* 8*d.* was an arrear accrued under the provincial statute; and *Mr. Read* contended, that as part of the sum was thus rightfully levied, whatever the case may be as to the other, that will enable us to treat the sale as not wholly illegal, and thus uphold the title of the purchaser; but we think we cannot assent to that argument. The whole land was sold to make up the one sum—we cannot divide it, and hold that part of the land was legally sold, and part not. We cannot distinguish; and the owner had no means of redemption but by paying all.

It has been made a question in this case, whether the district council could legally direct lands to be sold for payment of taxes, imposed not by the provincial statutes, but by their by-laws. That is a point certainly not clear upon the face of the District Council Act: I mean it is not clear what the legislature intended, and not clear either, I think, what powers may be assumed in that respect under the language, very general in its nature, which is used in the statute. After frequently perusing the 39th, 41st, 42nd and 57th clauses, I am not satisfied whether the legislature intended that the district councils might abrogate the rates imposed by 59 Geo. III., ch. 7 & 8, upon lands, and substitute others for them; the 42nd clause seems to give them the authority, but on a careful consideration of it the point is not clear. Admitting that they could not merely abrogate them, but substitute others of much larger amount, then the question would be—first, whether, independently of the 57th clause of the act, the district councils could sell the lands for payment of such taxes as they might impose on lands; and if not, then, whether that clause gives them the power, and whether they could legally, as they did by this by-law, not merely impose a rate, and provide for its collection, but add an accumulated tax by way of penalty in case of default, and direct the whole to be made by the sale of the land. I think at present they could not impose the accumulation by way of penalty, because I take it to be a strict principle that a power delegated by the legislature to impose taxes on the subject cannot be extended by any latitude of construction. There must be clear and express authority for whatever is done in that way; and the statute gives them power only to impose rates for certain objects, and to collect those rates—not to raise half as much again as is wanted by way of

penalty. As to the power of sale, it is not necessary after the opinion we have given on the other points of this case, that we should also determine that: I only therefore state it to be my present impression that without the 57th clause the district council could not have provided for the raising of their rates by sale of the lands. I take it the principles of the common law, which regulate such matters, are against it where the statute law of the land does not expressly give the authority, which the recent assessment law does, but which none of the previous statutes had done.

Whether the 57th clause, by a fair construction, does give that authority, seems to me a very doubtful point. I think it was not intended, or some provisions would have been inserted regarding sales of lands; but it is difficult to say that the words are not such as to include the sale of lands where necessary.

For the reasons already given, I consider the by-law void as regards the rate imposed by it in the 4th section—that the sale was illegal, and that a verdict should be entered for the plaintiff.

Per Cur.—Verdict to be entered for plaintiff.

DOE DEM. SHELDON V. RAMSAY ET AL.

Grant of Governor under his seal-at-arms—Power of Chief of an Indian tribe to act as agent for the tribe—Power of Commissioners of forfeited estates—59 Geo. III., ch. 12—Inquisition void for want of certainty—Description in conveyance—Meaning of phrase "more or less."

A grant of lands, in 1784, by the then Governor of the Province of Quebec, &c., under his *seal-at-arms*, to the Mohawk Indians and others, conveyed no legal estate; first, as not being by letters patent under the great seal; secondly, for want of a grantee or grantees capable of holding.

Held, also, that the mere fact of a chief of an Indian tribe assuming to act as a duly authorised agent in the name and on behalf of the tribe, showed no power in him so to act; and therefore, that a lease, signed by him as agent, &c., conveyed nothing.

And consequently, that such lessee had no estate which, on his being subsequently attainted of high treason, could be forfeited to the Crown, and vest in the commissioners of forfeited estates, under 59 Geo. III., ch. 12.

Though by the 33 Hen. VIII., ch. 20, the Crown, in case of attainder for high treason, would be deemed in actual possession without any inquisition of office, yet such lands only would vest in the commissioners under 59 Geo. III., ch. 12, as should be found by an inquisition to be vested in the Crown, and therefore no more land could possibly pass by a deed from the commissioners than the inquisition had found the traitor seized of.

And *held*, that the inquisition could not support the conveyance which the commissioners made; for it referred to nothing which could supply proof of identity, and the commissioners were not warranted in going beyond the inquisition.

And semble, that the inquisition was void for want of certainty.

(Q. B., T. T., 15 Vic.)

The defendants—James Ramsay, Hector Dickie, Mary Kerr, and

John Cleator—defended for a tract of land on the south side of the Grand River, giving a description of it by metes and bounds, not expressing in what township it is, nor what quantity of lands the lines embrace.

The plaintiff in his declaration sued for land in the township of Brantford, in the county of Wentworth, and described it as "being composed of all that certain tract of Indian lands on the south-west branch of the Grand River, in the township of Brantford, beginning at the white oak tree standing on the bank of the said river, on the south side of said river, above the Indian Mill, near a hut formerly known by the name of Culver's Hut, on the bank of said river, a few rods below said hut, said white oak tree charred on four sides, and four sides hacked, said tree standing two rods from said river, or thereabouts; and running south 10 degrees west 16 chains, to a stake marked B. M.; thence north 80 degrees west 38 chains 80 links; thence north 10 degrees east, to the bank of said river; thence along the bank of said river to the first-mentioned boundary, including all the privileges of the waters of the said river in front of the said lot."

At the trial of this ejectment, at Hamilton, before Robinson, C. J., at the last assizes, the lessor of the plaintiff claimed title under a sale made to him on the 9th July, 1832, by the commissioners of forfeited estates, under the statute of Upper Canada 59 Geo. III., ch. 12. It was shown that one Mallory had been, upon indictment and outlawry thereon, attainted of high treason, committed by him in the year 1813, in giving aid to the enemy during the war then carried on between Great Britian and the United States of America. And upon an inquest of office, which followed his attainder, it was found and returned by the jury, that at the time of his committing the high treason he was seized of certain estates mentioned in the inquisition, among which, were two tracts thus discribed: "Also a lease of a certain tract of the Indian lands, containing about 1,400 acres, joining the township of Brantford, leased to him for the term of 999 years; *and another lease, for the same term, of certain other Indian lands on the south-west bank of the Grand River, containing about sixty acres, more or less;*" and that he had no other lands to their knowledge.

It was about the last of these two tracts, described as containing "about sixty acres, more or less," that the dispute in this action has arisen.

The inquisition bore date 14th January, 58 Geo. III.

A verdict was given for the plaintiff.

Connor, Q. C., and *Galt* with him, in support of a rule *nisi* to enter a non-suit; or for a new trial without costs, on the evidence, and for admission of evidence after the plaintiff's case closed; objected to the inquisition having been admitted after the plaintiff's case was closed. The evidence was clear as to the quantity of land it was intended should pass—1 Sug. V. & P., ch. 7, sec. 3; *Day* v. *Finn* (Owen 133). The inquisition is void for uncertainty; and should have set out metes and bounds—*Pullen* v. *Birkbeak* (Carthew 453). The commissioners could only make a deed such as the titles on which they were acting would warrant; they had therefore no right to incorporate this description in their deed. A deed cannot convey 420 acres under an inquisition which only forfeited 60.

Such a grant from the crown would have been void—2 Bl. Com. 347; *Doddington's* case (2 Rep. 33); *Dowtie's* case (3 Rep. 10). There is no provision in the statute 59 Geo. III., ch. 12, for assigning a chattel interest in law.

Freeman, contra—The commissioners must be presumed to have exercised their authority properly—Taylor on Ev. 113, 119; *Doe Hopley* v. *Young* (8 Q. B. 63). He contended that Brant's lease to Mallory, coupled with the inquisition, made that certain which before was doubtful—"*Id certum est quod certum reddi potest*," and therefore the inquisition was not void for uncertainty; and as to not producing the inquisition, he said he did not consider it necessary, as the commissioner's deed recites it and shews how the inquisition described the land.

The statutes and facts bearing on the points in dispute are fully set out in the judgment of the Chief Justice.

ROBINSON, C. J.—By the statute 59 Geo. III., ch. 12, the Government was authorised to appoint commissioners, "in whom all the real estates which then were or thereafter might become vested in his Majesty by the attainder of persons convicted of high treason, committed during the said late war, should be vested for the purposes mentioned in the act."

And in order that all such estates might be "the better known, described and ascertained, and the rents, issues and profits thereof recovered for the use of his Majesty, and that due examination might be taken and satisfactorily made of all just and lawful claims to or upon such estates, the act provides that the Clerk of the Crown shall deliver to the commissioners an extract, certified under the seal of the Court of King's Bench, of all inquisitions, whereby any real or personal estate of any kind whatever shall have been returned as forfeited to his Majesty

by the attainder of any person of any high treason, as aforesaid: in which extracts shall be stated the names, additions and late places of abode of the person attainted; the species of treason of which, and the respective times, places and courts, when and where they were so attainted; *and also the real estates, chattels real or personal, debts, &c., which in the said inquisitions are found to be forfeited by such attainder;* and that the commissioners shall enter these extracts in a book or register to be kept by them; an extract from which book, signed by any two of the commissioners, shall be sufficient evidence, in any court, of the matter therein certified."

And, to the end that all the estates and interest vested in the commissioners under the act may be duly published, so as all persons having interest therein may have notice thereof, in such manner as they may enter their claims upon the same, as provided by the act, it was enacted, "that the commissioners shall cause this register to be open to public inspection without fee, and transmit to the special receiver, to be appointed under the act, an authentic copy of the register."

It is also provided that the commissioners shall send to the clerk of the peace of the district in which any of the lands forfeited shall be, a duplicate of every such entry, to be affixed on the door of the court-house, and to be inserted in a book to be kept by the clerk of the peace.

Provision is then made for receiving, hearing or determining the claims of any persons having or claiming any estate, right, title or interest in, to or out of any of the said estates vested or to be vested in the commissioners. And it is enacted, "that all and every the estate and interests which shall be entered in the register to be kept by the commissioners according to the directions of the act, to or upon which no claim shall be entered within the time and in the manner prescribed, shall be deemed or taken against all persons, and to all intents and purposes to be vested in the commissioners in virtue of the act."

Then by the 13th clause of the statute, the commissioners are directed to sell all and singular the real estate and chattels vested or to be vested in them by the act, by public auction, according to the best of their judgment; to give ninety days' public notice of the time and place of sale, and of the several particulars then and there to be sold; and to cause an entry to be made in their book of all and every the real and personal estate so sold, and of the buyers' names and prices paid, &c.; and, upon payment of the purchase money to the commissioners, to execute deeds of bargain and sale for such real estates as shall be in such manner sold to the respective purchasers thereof; which deeds are required to be registered as other conveyances of lands in Upper Canada.

It was proved on the trial that the extract of the inquisition entered in the commissioners' book, and of which a copy was delivered out by their clerk as the act directs, corresponded literally with the inquisition as regarded the tract of land respecting which this question arises. The date of entry in their books is 1st March, 1819, and the land is no otherwise described than thus: "And another lease, for the same term, of certain other Indian lands on the south-west bank of the Grand River, containing about sixty acres, more or less." No township, county or district is named as being that in which these sixty acres are situated.

It was then proved that on the 9th July, 1823, the commissioners of forfeited estates executed an indenture between themselves of the one part, and the present lessor of the plaintiff, William B. Sheldon, of the other part, in which they recite the statute and their own appointment as commissioners, that Mallory had been attainted of high treason, &c., and that amongst other things "the residue of the demised term of 999 years unexpired and yet to come of and in all and singular the lands, tenements and hereditaments thereinafter described, had by inquest of office been found to be forfeited to his late Majesty, as having been in the seizin of the said Mallory at the time of the committing of the said high treason; that is to say, a certain tract of the Indian lands on the south-west branch of the Grand River, containing about sixty acres," referring to the record of the conviction and judgment, and to the inquisition. And they recite further, that the said residue of the said demised term of and in the premises aforesaid, in the said county of Haldimand (which county of Haldimand had been nowhere before mentioned, either in the inquisition or extract, or in this deed), having by virtue of the statute become duly vested in the said commissioners, they did, on the 31st day of August, 1820, having given due notice and complied with all the other requisitions of the statute, sell the said residue of the said term of and in the said premises, with the appurtenances, by public auction, to the said William B. Sheldon, he being the highest bidder for the same, according to the provisions of the said act, at and for the price or sum of 17*l.* 10*s.* And then their deed witnesses that in consideration of the said sum of 17*l.* 10*s.*, and under and by virtue of the powers and authorities in the said statute contained, they thereby assigned, transferred and set over to the said William B. Sheldon, the present lessor of the plaintiff, his executors, &c., "all and singular the said residue of the said demised term of 999 years unexpired and yet to come, of and in all and singular the said parcel or tract of land situate on the south-west branch of the Grand River as aforesaid, and described in the original lease for the same from Jacob Brant [should be Joseph Brant],

agent of the Six Nations Indians, to the said Bonajah Mallory, hereunto annexed, as follows—that is to say, beginning at a white oak tree standing on the bank of said river, on the south side of said river, above the Indian Mill, near a hut formerly known by the name of Culver's Hut, on the bank of said river, a few rods below said hut, said white oak tree charred [should be "blazed"] on four sides, and on four sides hacked, said tree standing about two rods from said river or thereabouts; and running south 10 degrees west 16 chains, to a stake marked B. M.; thence north 80 degrees west 38 chains 80 links; thence north 10 degrees east to the bank of said river; thence along the banks of said river to the first-mentioned boundary, including all privileges of the waters of said river on the front of said lot, containing fifty-four acres, be the same more or less."

It will be observed that this description, which found its way into the commissioners' deed, is something quite independent of and wholly in addition to anything that appears in the inquisition, or in the commissioners' registered extract; and, for all that appears, the sale made by the commissioners, and the public notice that preceded it, contained nothing of this particular description, but were in the same general terms as the inquisition. They ought to have corresponded with that, according to the act, and it is to be presumed therefore that they did.

This particular description by metes and bounds, it will be seen, agrees exactly with the description of the premises described in the declaration, except that it calls the land 54 acres more or less, whereas in the inquisition the tract is called 60 acres more or less. The plaintiff claims in this action all the land which, he says, this particular description, by metes and bounds contained in the commissioners' deed, will embrace. How such a description came to be imported into the deed given by the commissioners was thus explained at the trial: Mallory, upon whose attainder the land had been forfeited, had fled from the county during the war, and it was known in what part of the United States he was residing. Sheldon, some time after he had made his purchase (the time for any persons making claim to any of the land returned as forfeited by the inquisition having necessarily elapsed before the sale), went to Mallory, and obtained from him, or from his agent, the lease, or a lease under which he represented himself to have held the tract in question; thus taking an assignment of it to himself, which is endorsed on the back of it, and which is signed by one William Mallory as agent of Bonajah Mallory.

This is dated 21st May, 1822, and he must have produced this lease to the commissioners of forfeited estates, for they have framed their

deed according to it in point of description, and it is referred to in their deed as being annexed.

The commissioners no doubt did this from a desire to give to their conveyance greater certainty; and assuming that this must have been the lease which is referred to in such general and vague terms in the inquisition, although there is a discrepancy between the two in the only thing which looks like certainty, in the description given in the inquisition, the latter calling the contents of the tract "about 60 acres," and this lease "about 54 acres."

At the trial this lease was produced by the lessor of the plaintiff, and he claims to hold according to it.

It is an indenture, made the 25th January, 1805, between the Six Nations Indians residing on the Grand River in the province of Upper Canada, by Joseph Brant, principal chief and agent for the said Six Nations, duly authorised in their name and on their behalf to execute leases of such parts and parcels of their lands as by the said Joseph Brant shall be thought fit to leased, of the one part, and Bonajah Mallory, of, &c., of the other part; and it recites that on the 25th day of October, 1784, at the city of Quebec, upon the representation of the said Joseph Brant, in behalf of the Six Nations of Indians, to the late General Haldimand, then governor and commander-in-chief of the province of Quebec, &c., he the said commander-in-chief, in consideration of the early attachment to the king's cause manifested by the Mohawk Indians, and of the loss of their settlements which they thereby sustained, by an instrument in writing by him subscribed, with his seal-at-arms annexed, and since registered in the Secretary's office of the province of Upper Canada, was pleased to grant, appropriate and assign to them and such other of the Six Nations as wished to settle in that quarter, six miles deep from each side of the Grand River, at the mouth thereof, and extending in that proportion to the head of the said river, to be enjoyed by them and their posterity forever. And this indenture witnesses, that the said Six Nations of Indians, by Joseph Brant, their agent, in consideration of a peppercorn rent, demised to Mallory, his executors, administrators and assigns, all that certain parcel or tract of land, being part of the above described territory, granted by the said commander-in-chief to the said Six Nations, beginning, &c., describing the land precisely as in the declaration in this ejectment, and in the commissioners' deed afterwards made, and stating the tract to contain fifty-four acres, more or less; to hold for 999 years, with covenant of the Six Nations Indians, by their agent, for quiet enjoyment. This instrument is signed by "Joseph Brant, agent," and by Mallory, and they both sealed it.

The commissioners' deed and this lease being produced, the chief contest at the trial was about the extent of the tract conveyed by the commissioners. Their deed, adopting the description contained in Brant's lease, professed to convey about fifty-four or sixty acres; but the plaintiff, by the effect which he desires to give to the description, would make it embrace about four hundred and twenty acres.

All turns on the point of departure, and that depends on what was the position of the white oak tree spoken of in the description by metes and bounds. The tree itself is no longer standing, and all trace of Culver's hut, which was a mere shanty, has long ago perished. Upon the point where that hut stood, there was a great conflict of evidence; the plaintiffs' witnesses affirming that it had stood about thirty chains higher up the Grand River than the defendants' witnesses declared it to have stood. The great difference this would make in the description arises from the circumstance of there being a great bend in the Grand River at that point. Beginning where the defendants' witnesses swore Culver's hut stood, the three lines mentioned in the description would inclose a tract of about sixty acres, lying evenly along the south bank of the Grand River, and parallel with it, in that part of its course having the east and west ends of the tract of about the same depth. It may have been commonly called sixty acres, upon a computation made of the figure as a parallelogram, supposing the points on the water's edge to be connected by a straight line; but probably the area is more correctly stated in Brant's lease at fifty-four acres, upon a computation, which throws out the curve of the river and the land covered with water. If, according to what the plaintiff contends for, the point of departure is taken on that part of the bank of the river where his witnesses described Culver's hut as standing, which is about thirty chains further to the west, then, measuring from thence south 10 degrees west 16 chains, and from thence north 80 degrees west 38 chains 80 links, as we are directed by the discription, would carry us so much further to the west that a line drawn from that point on the course given in the description north 10 degrees east, instead of taking us back to the river, as it was evidently supposed it would do, by a line of about the same length as that measured back from the river at the starting point—viz., 16 chains—would, on account of the great bend of the river, not touch its bank, except by a line produced 140 chains and 85 links.

The large tract of land embraced by the bend of the river, which would be thus included, is claimed, part of it by Indians whose cleared fields were under cultivation at the time Brant made his lease to Mallory, which clearly could never have been intended to interfere with their

possessions, and the remainder by other persons to whom the government has granted the land upon sales made by them for the benefit of the Indians, with their concurrence.

The plaintiff, to show what the description in Brant's lease would cover, called Lewis Burwell, a provincial surveyor, and relied upon a plan or survey made by Mr. Burwell, in which he had delineated the ground as surveyed by him according to the lines and courses in Brant's lease. He swore that he had commenced this survey, in May, 1827, at the request of the plaintiff Sheldon, who employed him for that purpose; that, knowing nothing of the former position of Culver's hut, referred to in the lease, and not having before made any survey on the Grand River, he started from a tree, which Sheldon pointed out to him as the one referred to in the lease as standing near were Culver's hut had stood; and as he proceeded in his survey from that point, the Indians, finding he was running his line through their fields, remonstrated, alleging that these were lands which they had always had in their possession, and which Brant could have made no lease of; and he found it necessary to desist. Afterwards, in 1833, he continued his survey at Sheldon's request, and made the plan produced on the trial.

Not long after he had done this, he was requested by some of those with whose possessions the description as contended for by Sheldon would interfere, to survey their property; and the government, before they made grants on behalf of the Indians, as they contemplated doing about that time, also employed him to survey that part of the country, and he then did not adopt the tree as the starting point, which he had before taken as pointed out to him by Sheldon, but he took depositions of persons whom he examined as to the true position of Culver's hut, and among them the son of Culver then living, and was perfectly satisfied, as he swore, from the evidence he received, that he had been misled as to the starting point when he made the survey for Mr. Sheldon; and laying down a tract by the lines and courses in the lease, taking as his point of departure what he ascertained from the old inhabitants to whom he referred to have been the true position of Culver's hut and the tree referred to as being near it, he found the tract to embrace about the quantity of land mentioned in the lease; and that it would be such a tract as it must have been intended to lay out, though, taking the survey either way, it would interfere with a reservation of land which seems at an early period to have been assigned to or intended by the Indians for a family by the name of Kerr.

It seems that Brant had agreed with Mallory to construct a wooden bridge over a small stream running into the Grand River near this tract,

and was to give him sixty acres of land for the job. He may possibly have had the consent of the Kerr family to interfere with their tract to the limited extent which his lease was meant to cover.

However this may be, the evidence was such as, I must say, left no doubt in my mind that a survey such as the plaintiff contends for never could have been such a survey as formed the basis of Brant's lease. The contents of the area which the respective surveys would embrace, do not, to my conviction, show this more plainly than the courses and distances set down in Brant's lease; for these show plainly that an actual survey had been made, in order to obtain the proper terms of that description, and that the intention was to lay down a tract along the river, of moderate depth, to embrace about 60 acres, and to present a parallelogram which should lie along, and correspond with the river in that part. It was evidently found that to lay down such a tract, the rear line would require to be on a course north 80 degrees west, and so laying down a rear line on that course which would range with the general bearing of the river at that part of it, the two ends of the tract might be on the same course, and would be about the same length, and the three lines would embrace an even and convenient figure. A compass must have been used on the occasion—an actual survey must have been made, for a post is referred to in Brant's lease, as planted at the end of the 16 chains, of which no trace can be expected to be found now. But any surveyor, or any person using a compass, if he had started from the the point the plaintiff contends for, as the tree mentioned in Brant's lease, and first run south 10 degrees west 16 chains, then north 80 degrees west 38 chains 80 links, must have seen that the course was carrying away from the river, and would not be the proper course at that point (30 chains higher up the river), for embracing a tract of moderate dimensions lying along the river, and bounded by the river in front. He must have seen that to run the rear line on such a course at that part of the bend of the river, and for such a distance, would take him to a point from whence he could not return to the river by the same course as the line bounding the other end of his tract, without going 140 chains instead of 16, and making one end of his tract about nine times as long as the other, and without containing seven times as much land as was meant to be demised; and giving Mallory the exclusive control over one bank of the Grand River for about three miles, instead of 38 chains.

If any such line had been, it would have been made plain at once that it could not answer the purpose intended; and would have crossed fields that Indians were in the actual occupation of.

Independently of the legal questions as to what the commissioners' deed could convey, considering the inquisition on which it was founded, and the quantity of land which it expressed—which latter question indeed would apply as well to Brant's lease as to the inquisition—I found the considerations I have mentioned so convincing, that I cannot say I had the slightest doubt on my mind that those witnesses must be in the right who described Culver's hut to have stood at such a point as Mr. Burwell assumed on the evidence to be correct when he made his last survey; and not those witnesses who assigned it to a position so utterly inconsistent with what must have been the actual starting point in the survey on which Brant's lease is founded.

I explained my views very fully to the jury, and in such a manner as could have left them under no doubt that I considered what the plaintiff contended for as altogether unreasonable and inadmissible. They were out a long time, and at length came in with a verdict for the plaintiff, which seemed to me a very unsound conclusion, from the evidence.

The verdict seems to me so impossible to be reconciled with reason and probability, and so contrary to the weight of the evidence, that if no other question arose in the case, we should have no difficulty in granting a new trial, that the case might receive the consideration of another jury upon the merits. There is no ground whatever afforded by the evidence for assuming any intermediate point between that which the plaintiff contends for as the point of departure, and that which the defendant maintains is the true point. It would be acting arbitrarily, and without any regard to evidence, if we were to adopt any point between. The question, therefore is nothing else than whether we are to adopt as correct the description which embraces 420 acres, or that which agrees with the inquisition and the deed, by which 60 acres at the most were understood and intended to be conveyed. There was no doubt evidence that, if believed, may be said to support the opinion formed by the jury that Culver's hut stood in the position which the plaintiff contended for; but the positive and direct evidence to the contrary appears to me much the stronger; and the most material thing is, that when we come to apply to the ground a description framed upon the supposition that the plaintiff's witnesses are right in the position they assign to the hut—we find the conclusion irresistible that either the memory of those witnesses must have deceived them, or they must be stating what they do not know.

It is plain an actual survey with a compass was made on the ground, in order to lay out and obtain a proper description of the 60 acres in-

tended by Captain Brant to be leased to Mallory, or 54 acres, excluding the river; the lines also, I think, it is equally clear, were surveyed, because a post is referred to as having been planted at the end of a line sixteen chains from the river.

No person with compass and chain could possibly have laid out such a tract of 60 acres, starting from where the plaintiff's witnesses say Culver's hut stood, running the courses mentioned in the description contained in Brant's lease, without finding that instead of striking the river at the east end of the tract by a line of about the same length as the other end, he would have to go nine times as far, and instead of laying out for Mallory 60 acres of land that would interfere with none of the fields and improvements of the Indians, he would be embracing in his description 420 acres, and many fields which they were actually cultivating, and houses in which they lived, which Brant, it is quite certain, never intended to lease, and which Mallory, it is equally certain, would never have been permitted to occupy, and never could have imagined were intended to be leased to him. There was not the slightest evidence that, from 1805, when Mallory received this lease, till 1812 or 1813, when he fled the country, he ever asserted a claim to and such tract of land as such a description would cover. Nor was it proved upon the trial that the lessor of the plaintiff, for very many years after the year 1820, when he bought this lease forfeited by Mallory, or supposed he was buying some interest in a lease, ever set up a claim to cover by his purchase such a tract as he now claims to, or attempted to molest those who were cultivating it, and living upon it, as they had been for years before his purchase. If he had believed when he paid the 17*l.* 10*s.* that he was bargaining for 420 acres of land, under a deed which expressed the quantity conveyed to be only 60 acres, or if he had soon afterwards any such idea, he should have lost no time in advancing such a pretention, if he ever meant to advance it; for the probability is, that there would have been no difficulty then in ascertaining the position of Culver's hut by such evidence as would have proved the matter beyond all doubt. Perhaps some remains of it were still then in existence, or the tree might have been then standing which was referred to as near it. As it is, the evidence leaves no doubt that neither Mallory himself nor the witnesses, who seem to have perplexed themselves and the jury about the position of Culver's hut, ever had an idea that Brant had leased to Mallory more than 60 acres.

It would be strange that neither Brant, nor Mallory, nor any of the Indians, seem to have had the slightest notion that Mallory's lines took in 420 acres, and nearly three miles of the winding course of the river,

although Culver's hut was there, and could be seen, and there could be no room for doubt at that time from what point the lines were to run.

How it happened that when there was a conflict of evidence in regard to a matter which depended upon memory, and which depended on the position of an object, which had perished, the jury should have disbelieved that evidence which on the face of it was probable and attended with no difficulty, and was consistent with the deed, and with the known bargain between Captain Brant and Mallory, and should have adopted that account which it is impossible to reconcile with the intention of the parties, as expressed in the deed, and with their conduct, it is not easy to understand. And one is the more surprised when it is considered how extremely unreasonable the claim set up is, and what confusion and injustice it would create, if it could be established.

But the question upon the description is not the only question in the case. Various legal objections were taken at the trial, and insisted upon; and the lessor of the plaintiff, by setting up a claim which is in its appearance very repugnant to reason, has thrown upon the court the necessity of deciding some legal questions of no small importance, though perhaps they are not such as can be called difficult.

The lessor of the plaintiff claims the land in question under an inquisition, which gives no other description of the estate than by calling it a lease for 999 years of certain other Indian lands on the south-west bank of the Grand River, containing about 60 acres more or less; and under that lease, which is the foundation of his title, he claims 420 acres, because, he contends, the tract which is so obscurely described in the inquisition was no other than that which Mallory had held under a lease from Brant; and he claims to have the benefit of the description of that tract as it stands in the lease. He thus identifies his title with that lease; and there is no doubt, that whatever was held by Mallory under that lease, is what the commissioners supposed they were conveying to the lessor of the plaintiff.

The first objection is, that Mallory held nothing under this lease of Brant's which the law can recognize to be a legal estate or interest, and which could be forfeited by his treason; and we have in effect determined that he did not, by the judgment which was given in this court in Easter Term, 6 Wm. IV., in the case of *Doe dem. Jackson* v. *Wilkes*.

In the first place, the Six Nations of Indians took no legal estate under the Instrument given by General Sir Frederick Haldimand. He did not own the land in question, and could convey no legal interest by any instrument under *his seal-at-arms*. Being Governor of Canada, he could have made a grant of Crown lands by letters patent under the

great seal of the province, which would have been matter of record; but he could no more grant this large tract on the Grand River, by an instrument under his seal-at-arms, than he could have alienated the whole of Upper Canada by such an instrument. Such an instrument could pass nothing.

But secondly, if such an instrument had been made under the great seal, in the ordinary and proper manner, it could pass no legal interest for want of a grantee or grantees, properly described and capable of holding. It grants nothing to any person or persons by name, and in their natural capacity. General Haldimand could not have incorporated the Six Nations of Indians, if he had attempted to do it expressly, by an instrument under *his seal-at-arms*, and still less could he do it in such a manner incidentally and indirectly by implication. A grant "to the Mohawk Indians, and such other of the six nations as might wish to settle on the Grand River, of a tract of land, to be enjoyed by them and their posterity forever," could not have the effect upon any principle of the law of England of vesting a legal estate in anybody. It could amount to nothing more than what it was well understood and intended to be, a declaration by the government that it would abstain from granting those lands to others, and would reserve them to be occupied by the Indians of the Six Nations. It gave no estate in fee, or for life, or for a term of years, which the Indians could individually or collectively transmit.

Thirdly, if it could have done so, then the ordinary consequence must have followed, that the grantees could only have alienated it by a deed of their own, or a deed executed by some one as their attorney, under a due authority given by them under seal; and if there had been an attorney duly authorised by them, he could only have conveyed their lands by a deed executed in their name, not in his own.

Nothing is shewn here to prove any authority delegated to Captain Brant to part with these lands on the Grand River, so that the Indians could be dispossessed by his act of their interest in it, whatever, that might be. Nothing whatever is shewn but that Joseph Brant chose to put his name and seal, as "Joseph Brant, agent," to an instrument by which he professed to alienate 60 acres of the land of the Indians for 999 years. He was, no doubt, a chief among them; but we cannot say that that gave him any right to alienate to individuals whatever portion he pleased of the lands held by the crown for their use, and upon such terms as he pleased. We cannot recognise any peculiar law of real property applying to the Indians—the common law is not part savage and part civilised. The Indians, like other inhabitants of the

country, can only convey such lands as they legally hold, and they must convey by deed executed by themselves, or by some person holding proper authority from them under seal, to convey their estate in their name. If the Six Nations had, in 1805, when Brant's lease was made, held a legal estate in all the lands on the Grand River, we could not hold that Captain Brant could divest them of their right to 60 acres of it, by making a deed to Mallory in his own name, without admitting that he could equally at his pleasure have divested them of their whole territory, by leasing it to Mallory for 999 years, as he did this, at a pepper corn rent. There is nothing here but the mere execution of a deed in a manner that could bind no one but himself, under the assertion of an authority from the Indians, which is in no manner proved.

Where the foundation is so defective it is to little purpose to consider how far it could be admitted to be a good execution of the power to lease, if any had been proved, to alienate for 999 years, at a pepper corn rent, a tract professing to embrace 60 acres, but which, according to what the lessor of the plaintiff contends for, embraces 420 acres.

It is in my opinion quite certain that Mallory was not seised under the deed which is set up here as the foundation of his title of any legal estate whatever, and so that he could forfeit none; in which respect this case stands on the same ground as that of *Denn ex dem. Warren* v. *Fearnside* (Wils. 176), in which, as in this case, land had been sold by the commissioners of forfeited estates after the Scotch rebellion of 1715. The statute 1 Geo. I., ch. 50, had vested those estates in commissioners in the same manner as our statute already referred to, and no claim being made, they had been sold to the defendant. The lands had been forfeited as having been in the seisin of one Plessington, an attainted traitor, to whom a lease had been made the year before the rebellion, which lease the court held to be void, because being a lease for three lives, and so a freehold lease, it was made to commence *in futuro*. The lessee nevertheless had entered, and enjoyed under it, and had paid rent. The lease was void also for another reason, that Plessington was a papist, and disabled by statutes 11 & 12 Wm. III., ch. 4, from holding. The case was very fully argued, and the Court of Common Pleas determined that the lease, being of a freehold and made to commence *in futuro*, was therefore void: Secondly, that Plessington, entering and enjoying the premises under that void lease, was a mere tenant at will: Thirdly, that a tenant at will has no estate that he can forfeit to the crown; Fourthly, that the lease was also void on the ground of Plessington being a papist, (though on that point the court were not unanimous): Fifthly, that the possession of Plessington (the lease being

void) was the possession of Warren: so that, as the estate was never out of the possession of Warren, there was no occasion to make any claim before the commissioners under the statute 1 Geo. I., ch. 50.

The learned Judge Foster differed from the rest of the court only on the point of the legal consequence of Plessington being a papist; thinking that he might nevertheless take for the benefit of the crown, and forfeit for his treason; but in all other points the court was unanimous, and it consisted of DeGrey, C. J.; Gould, Blackstone and Nares, JJ.

The case was several times argued, and it is so far stronger than the present against the right of the owner of the estate, and in favor of the purchaser from the commissioners of forfeited estates, that there the purchaser under the commissioners had entered and enjoyed, and no claim had been made under the statute, and yet he was dispossessed on the ground that the supposed term which had been treated as forfeited, was a void term. Here the beneficial owners of the land sought to be recovered have never been dispossessed, but the purchaser of the supposed forfeited term, which turns out to be no term, is now seeking to dispossess them; and not only so, but under a purchase of a supposed lease of 60 acres, is contending for a right to 420 acres.

That consideration brings up other questions, which have also been raised in this case, but which it is obviously not material to go into—if I am right in my opinion that no legal estate in any land was created by Captain Brant's lease, and that Mallory was seised of no interest even in the 60 acres, which he could have forfeited to the crown by his treason.

I refer now to the exceptions taken by the defendant's counsel, that the inquisition, as regards this lease, was so vague and uncertain in its terms, that nothing could vest under it in the commissioners—that the provisions of the Forfeited Estates Act, could not operate upon anything so loose and imperfect; that the commissioners could not, by their deed effectually convey any more or other lands than were returned and described in the inquisition itself, which was the foundation of their title; that the assuming to convey 60 acres by a description which will embrace 420 acres, if the fact be so, and which description not being contained in the inquisition or extract, cannot be taken to have received the consideration of the inquest, was therefore an unauthorised act, which can prejudice no one; and that, independently of all other objections, 420 acres of land cannot pass under a deed which professes only to convey 60 acres more or less.

I do not at present see that the plaintiff's claim could be sustained against all these objections; on the contrary, my opinion is, that some,

if not all of them, are well founded, and would be fatal at any rate to his case.

Great scope, no doubt, is given to the maxim *id certum est quod certum reddi potest;* but where is the reference in the inquisition to anything by which it can be made certain what was intended? "Another lease for the same term, of certain other Indian lands on the south-west bank of the Grand River, containing about sixty acres more or less:" this is all the description given of what is forfeited.

For anything said in the inquisition, the land might have been fifty miles higher up or lower down the river; anywhere, in short, between the mouth and the source. The fact that Mallory did hold a lease of Indian lands, which the commissioners, going beyond the inquest, and for all that appears beyond the evidence before the inquest, have annexed to their deed, does not seem to me to authorise them or us to assume that that must have been the lease to which the inquisition refers. If it be true that the description in the lease will embrace 420 acres, instead of 60, that disproves the identity, for the jury returned no such estate as that in the seisin of Mallory. The inquisition makes no mention of any lease by Brant, it speaks only of "*another lease.*"

If the inquisition had returned "sixty acres on the north side of the St. Lawrence," without any further description, would that bind any land, of any quantity, which Mallory could be shewn to have been seized of, between Kingston and the eastern limit of the province?

It would seem rather to be a case calling for a writ of *melius inquirendum.*

The Forfeited Estates Act (sec. 12) only vests in the commissioners the estates that had been described in the register, which must be, and in this case was, a transcript from the inquisition; and that being all that was vested in them, they could sell no more; and it would be inconsistent with the intention of the act to afford protection to all parties who might have claims, either through mortgage or otherwise, if under an inquisition, and published extracts and notices, all speaking of a tract of about sixty acres, they should find themselves shut out because they did not understand 420 acres to be included, and because they did not make a claim which there was nothing in the inquisition, or extract, or notice of sale, to shew there could be any necessity for making—nothing but a description contained in a paper, which was in the pocket of Mallory when he left the province, and which never had been seen by the jury or the commissioners till after the sale.

For the reasons I have stated, I think the plaintiff wholly failed to support his right to a verdict; and the rule must be made absolute for a non-suit.

A non-suit was moved for when the plaintiff closed his case, on the ground that no evidence had been given of the inquisition, which it was contended was indispensable. The plaintiff then produced a copy of the registered extract, which, it was argued, should be received in the place of the original, which is made evidence of the inquisition by the statute, and this removed that ground of exception; but the defendant's counsel then objected that the inquisition, as shewn by the extract, could not support the conveyance which the commissioners of forfeited estates had assumed to make to the lessor of the plaintiff, for it referred to nothing which could serve to supply proof of identity; and the commissioners were not authorised to go beyond the inquisition. They could not, as it was contended, found their deed upon an instrument produced to them for the first time long after the inquisition had been returned—an instrument which the jury had no evidence of, and could not be supposed to refer to in the inquisition; and by adopting that instrument as their guide, extend the effect of the inquisition from 60 to 420 acres, which the lease would cover according to what the lessor of the plaintiff contends for.

I was under the impression at the trial that the objection was insuperable, but desired to reserve it for future consideration, because both parties had come prepared with witnesses on the point of the locality of Culver's hut, and I thought it desirable, as it might tend to put an end to contention about that fact, to have that point investigated.

If it was clearly understood by the parties, as I believe it was, that it was to be open to the defendant to renew his motion for non-suit in banc. on the ground I have last stated, then our opinion is, that the rule for entering a non-suit should be made absolute.

The exceptions to Mallory's title, to which I have adverted, do not seem to have been moved as grounds of non-suit, but in our opinion they are insuperable objections to the plaintiff's recovery.

BURNS, J.—Two questions fairly present themselves in this case for decision, either of which, if against the plaintiff, must determine against his right to maintain this action.

First: Supposing that Mallory had such an estate in his lands as could be forfeited, then did the commissioners' deed convey any estate to the lessor of the plaintiff in the lands which he seeks to recover in this action? This question naturally subdivides itself into the following: 1—Does the inquisition support the conveyance: 2—is the conveyance larger in its terms than the inquisition: and 3—if the inquisition does support the conveyance and the conveyance is not wider in terms than the inquisition, then supposing the verdict to be right as to

the starting point of the description, will that be sufficient to convey the lands sought to be recovered here, the quantity of land being expressed to be 54 acres more or less, in the deed. The inquisition in this case was taken by virtue of the royal prerogative, but the title of the crown to the lands does not depend upon office found, for by statute 33 Henry VIII., ch. 20, sec. 2, it is enacted that upon attaint of high treason, whether it be by the course of the common law or by statute, the crown shall be deemed and adjudged in actual and real possession without any office or inquisition found; and if the crown had granted the lands in this case without office found, the grant would have been good.

The statute 59 Geo. III., ch. 12, vested the lands of aliens upon inquisition as therein mentioned, and also the estates real and personal of those attained of high treason, in such commissioners as the government should appoint, and declares that such estate should be vested in the manner and for the ends and purposes in this act mentioned. Now, though Mallory's lands would have been deemed and adjudged in the possession of the crown without office, the question is whether under this act any other lands than such as were returned upon inquisition became vested in the commissioners. Although the words of the first section are wide enough to embrace all estates whatsoever, yet the 2nd section declares that to the end that all the estates of the said traitors may be the better known, described and ascertained, it is enacted that the clerk of the crown shall deliver to the commissioners a certified extract, under the seal of the court, of all inquisitions whereby any real or personal estate of any kind whatever has been returned as forfeited by the attainder, &c.; and in these extracts shall be stated the names, additions and late places of abode of the persons attainted, the species of treason of which, and the respective times, places and courts when and where they were so attainted, and also the real estates, chattels real or personal, debts, goods and effects whatsoever, which in the inquisition are found to be forfeited by such attainder; and these extracts the commissioners are to enter into a book to be kept for that purpose. The 4th section gave power to the commissioners to inquire into such estates and to sell the said real estates. The 13th section gave the commissioners power to sell the said real and personal estates by auction, &c.; and it was under this authority that the property was sold in this case. I think the whole scope of the act shews that it was only contemplated to vest in the commissioners such estates as should be found by inquisition to be vested in the crown, because not only the past was spoken of, but the future also; and it is quite clear that in future, after the passing of the act, it would only be such estates as should be re-

turned upon inquisition found which would be vested in the commissioners. If this be so, then it appears to me the validity of the inquisition does come in question, because it is absolutely required to sustain the deed. The statute 2 & 3 Ed. VI., ch. 8, sec. 8, has been held to apply to all inquisitions (*Vide Doe* v. *Redfearn*, 12 East. 96; also notes Thomas' Coke, 1 vol. 303, 304, 2 vol. 197). No valid grant could be made upon this inquisition, because it does not state of whom the lands were held, and where nothing was found in that respect, it would be the same as stating that the jury were ignorant, and in such case a writ of *melius inquirendum* would be awarded. Then again, the inquisition says the lands were certain Indian lands which were on the south-west bank of the Grand River, which may be anywhere from the mouth of the river to its source. This certainly gives no information of the locality of the lands; and though it might be sufficient to have awarded a *melius inquirendum*, yet the description itself, if that is to be acted upon, would support any deed for any lands which might be made within a space of perhaps two hundred miles. I must say I think there is a want of certainty in the inquisition which ought to render it insufficient (*Raysing's* case, Dyer, 208). If the inquisition can be got over, then comes the question—whether the conveyance is not wider that the inquisition? The inquisition finds as forfeited to the crown a certain tract of land containing about sixty acres more or less, on the south-west bank of the Grand River, and the conveyance upon the face of it tells us that the particular description which is set forth contains 54 acres more or less, but the plaintiff says that in fact the description contains 420 acres. The inquisition contains no boundaries, but professes to declare that Mallory at the time of his attainder was entitled to about 60 acres more or less. As I have before endeavoured to prove, the question is not in truth how much or what quantity of land Mallory had, or which he did forfeit; but how much and what quantity became vested in the commissioners by virtue of the act of Parliament. Without any particular words of description to limit or enlarge the expression *about* 60 *acres more or less*, I can never imagine that 420 acres are to pass; and therefore when the commissioners became vested with the estate, it was with that only which had been forfeited, viz., about 60 acres. They do not profess to convey even that quantity, for they call it only 54 acres more or less. For reasons which will appear in the sequel, I cannot bring my mind to believe that more than 60 acres ever became vested in the commissioners by means of the inquisition, and consequently they could convey no more; and if their conveyance is, by reason of false description, made to embrace more than

that, the defendant is not to be deprived of his land for that reason, even though the plaintiff's deed may be thereby rendered void for what he might otherwise claim and ought to have. But, suppose the description is correct, that is applying the external proof upon the ground to it, and that it in truth does embrace 420 acres, that in my opinion does not help the plaintiff, because I think no more than the 60 acres were vested in the commissioners. Suppose, however, that all the land which Mallory owned did become vested in the commissioners, and that the inquisition supports the deed, then when the commissioners professed to sell 54 acres more or less, will 420 pass by that deed under a description which would cover 420 acres? If one were selling a lot by its number or name, and misstated the number of acres, or misstated the boundaries of it, that case may be understood without difficulty; but in this case external evidence must be applied before it can be ascertained whether the description embraces only the 54 or the 420 acres. In such latter case I conceive it is very important that we should look at the quantity the parties intended should be conveyed. To understand such a case, we must rightly comprehend what meaning is to be attached to the expression *more or less*. In a very old case *Day* v. *Finn* (Owen, 133), it was held that ten acres, *sive plus sive minus*, did not pass 30 acres; and Yelverton held that by the expression should be intended a reasonable quantity more or less, by a quarter of an acre, or two or three at most; and if there were three acres less than ten the lessee must be content with it. In *Portman* v. *Mill* (2 Russ. 571), the agreement was to sell 340 acres by estimation be the same more or less, but on measurement it turned out to be 100 acres less, and Lord Eldon said with respect to the difference, he never could agree that such a clause would cover so large a deficiency in the number of acres as was alleged to exist there. Sir Edward Sugden mentions a case decided in 1825, of *Gell* v. *Watson*, where the sale was according to a plan, and, in enumerating the different quantities, the agreement proceeded to say the whole quantity, was about 101 acres, 3 roods, and 29 perches. There was a deficiency of 2 acres in two of the closes which were stated to contain together 8 acres, 1 rood, and 4 perches, and the purchaser was held entitled to an abatement in the price. It is unnecessary to express any decided opinion upon the point whether the description contained in the commissioners' deed, supposing the jury to have found correctly, would pass the whole 420 acres, or should be confined to about 54 acres, because I am clearly of opinion that no more than the quantity mentioned in the inquisition (suppose that be sufficient) can ever be held to have become vested in the commissioners

—though, if Mallory had more lands than those mentioned, they would be vested in the crown; but the commissioners could convey no more than under the act became vested in them; and because I am fully of opinion that the inquisition itself, in respect of the want of certainty of the description of the lands and of whom held, did not sufficiently authorise commissioners to sell or dispose of any particular lands as belonging to Mallory—that is, certainly not applicable to those sought to be recovered in this action.

The second question which naturally presents itself is, whether Mallory had any forfeitable interest in the lands in dispute between these parties. Suppose the description in the commissioners' deed can be held to embrace the land, it appears from the document intended to be a lease, which the lessor of the plaintiff has put in evidence, that the land in question was part of the lands set apart by General Haldimand for the Six Nations of Indians. The instruments setting apart these lands is referred to in the lease now produced, as bearing date the 20th March, 1795, and as being duly registered in the office of the secretary of the province. It is matter of history, as is well known, that the British Government were originally the proprietors of the lands on the Grand River, and that these lands were set apart by General Haldimand, the then governor of the province of Quebec, in order to permit the Mohawk Indians, and others of the Six Nations, who had lost their settlements situated within the American States, in consequence of their adherence to the British standard, to take possession of and to settle upon them, and which they and their posterity were to enjoy forever. The fee simple in the lands was in the first instance vested in the commissioners; and one question is whether the crown had divested itself of that interest, or only permitted the Indians the use and enjoyment of the lands—the crown acting in fact in the light of a parent and guardian of them, as it were, for these tribes. It never can be pretended that these Indians while situated within the limits of this province, as a British province at least, were recogized as a separate and independent nation, governed by laws of their own, distinct from the general law of the land, having a right to deal with the soil as they pleased; but they were considered as a distinct race of people, consisting of tribes associated together distinct from the general mass of the inhabitants, it is true, but yet as British subjects, and under the control of and subject to the general law of England. As regards these lands on the Grand River, the Indians had no national existence nor any recognized patriarchal or other form of government or management, so far as we see, in any way; the lands, as appears from the document under

which the tribes claim title to them, shew that they belonged to the British Government. There seems to have been no trust created in these lands in any person or body of persons for the Indians, neither was it necessary there should be, for it was more natural the crown should be in a situation to protect their interests and treat them as a people under its care, not capable of disposing of their possessions. Although they are distinct tribes as respects their race, yet that gave them no corporate powers or existence; but so far as the lands are concerned, for all we can see, the government intended that all members of the tribe should be upon an equal footing, and each individual should have an interest in the lands to him and his posterity. The government must have considered these people as placed in such a position, and must have intended to have treated them in that light, and consequently never intended to have parted with the proprietorship of the soil. It is quite clear from the instrument signed by General Haldimand, that the government never did more than through the governor of the province permit the Indians the occupation of the lands. This permissive occupation constituted them, as it were, mere tenants at will to the crown; and if that be so, then it follows that they could grant no interest to Mallory such as is pretended in this case which could be forfeited by reason of his treason, and the plaintiff can have no title through the inquisition. Besides this view of the question there is another, which appears to be beset with insurmountable difficulties. The lease which the plaintiff produces purports to be made between the Six Nations of Indians residing on the Grand River, by Joseph Brant, principal chief and agent duly authorised in the name of them, the said Six Nations, and in their behalf to execute leases of such parts and parcels of their lands as by the said Joseph Brant shall be thought fit to be leased of the one part, and Mallory of the other part. It is not proved or shewn how or in what manner Brant had or could have such authority mentioned; and, supposing the government intended the Indians to have something more in the lands than a permissive occupation of them, it is difficult to conceive that any such authority as here pretended to be exercised amounts to a legal right of disposition. Brant professes to lease the land in dispute for a period of nine hundred and ninety-nine years, and one of the absurdities of the instrument is that it professes that the Six Nations of Indians covenant with Mallory for quiet and peaceable possession. It is a novel thing in our day to see a whole nation enter into a personal covenant for quiet enjoyment of lands, and the surprise with which that novelty strikes the mind is not the less because the parties who entered into such covenant happen to be a body

of North American Indians. As before remarked, these tribes cannot be looked upon or treated as corporate bodies, without being created such in some way known to our law; and, so far as we know, there were no means by which Brant could be appointed or have delegated to him the authority of each individual member of the tribe for himself and his posterity, to grant and dispose of the lands as he thought fit to be leased. We read that Abraham and Abimelech entered into a covenant in regard to a well, and the same thing occurs even to the present day, that the chiefs of the nomadic tribes of some parts of the east bind the tribe in respect of their dealings, though the tribe, with other tribes, is under the government of a superior authority. Whether the Indian tribes of this continent acknowledge such absolute authority, and whether it would require to be delegated by a council, I do not know; but, whatever may be the Indian laws or customs in this respect, I take it to be clear that the property in the lands, which were confessedly at one time in the crown, must be dealt with and disposed of according to the general law of the country, unless we see that the crown has intended it to be governed by some other law. Most certainly by our law, without something more than a person designating himself an agent, and signing himself as such, a whole body of persons could not be bound by the act of one. The government perhaps, in transactions with a tribe, may recognize the acts of those known to be the principal chiefs as being the acts of the whole body; but that is a very different matter from calling upon a court of justice to give effect to the alienation of lands, which, for all we can see, must be governed by the same rules and laws which regulate the title to all property within our jurisdiction. No authority is shown in any way which could warrant Brant disposing, on behalf of the Six Nations, of these lands by such an instrument as produced in this case. It is very true the Indians are not contesting the validity of the act of their chief; but, inasmuch as the plaintiff undertakes to prove that he has a good title to the lands because Mallory owned them and forfeited them by reason of his treason, the defendant has a right to put the plaintiff to prove a strictly legal title, and forces upon our consideration the question whether in truth Mallory had any legal interest upon which the inquisition can attach. The case of *Doe on the demise of Warren* v. *Fearnside*, bears out this position.

Whether the jury have arrived at a sound conclusion in regard to the starting point of the description of the land may well, I think, be doubted; but that, however, was a matter within their province to decide.

Upon the legal right, however, of the lessor of the plaintiff, I feel clear he must fail, and that he never can succeed in this action, or in any action of ejectment founded upon this inquisition and Mallory's title under the instrument produced at this trial.

DRAPER, J., being concerned in this case when at the bar, gave no judgment.

BEAVER V. REED.

Case for overflowing land—License revocable at will not assignable.

W. G., owning lot 24, obtained a parol license from the plaintiff, owner of lot 25, to erect a dam across a stream running from lot 25 through lot 24, and thereupon erected a dam, and, in further consequence of such license, built a mill on said lot, to be worked by means of said dam. The defendant purchased the lot, mill, &c., from W. G., and for the purpose of working the mill upheld the said dam, and thereby overflowed plaintiff's land. Plaintiff brought his action, and defendant pleaded the license to W. G.; and that he (defendant) having purchased the lot, &c., from W. G., for the purpose, &c., upheld the said dam, &c.

Held, on demurrer (Robinson, C. J., *dissentiente*), plea bad:

1st. Because the license being coupled with the grant of an easement, the grant not being by deed, was void, and the license consequently revocable.

2ndly. Because it was a license, for all that appeared, given to Graham personally, and being revocable was not assignable.

3rdly. Because the right to overflow plaintiff's land was claimed as incident to the possession of the mill on lot 24; but the plea did not show that the right so formed such an incident, either by the manner of its creation or otherwise.

(Q. B., T. T., 15 Vic.)

Case for overflowing land.

The declaration stated plaintiff's possession of No. 25, 8th concession Puslinch, across and from which lot there is a stream of water running to and across No. 24, in the 8th concession Puslinch; that before the erecting of the dam complained of, the water of said stream did run and flow, and of right ought to run and flow without interruption, and by reason of his possession of No. 25 plaintiff should by right have the water run and flow in and across No. 24, in its free, usual, uninterrupted and natural course; that one W. G. wrongfully erected a dam on No. 24, and defendant wrongfully upheld it, whereby part of No. 25 was overflowed.

Plea: That one W. G. being possessed of lot No. 24, and desiring to erect a mill thereon, and requiring a dam across said stream on his lot, the plaintiff gave to the said W. G. license and permission to erect on said lot across said stream the mill-dam in question; and W. G., by such license of plaintiff, and *at the cost* of W. G., in consequence of such license, while possessed of said lot, did erect said dam; and in

further consequence of such license W. G. erected a mill on said lot at great expense, to be worked by means of said dam; and defendant having acquired said lot, mill and dam by purchase from W. G., and being the occupier succeeding W. G., hath for the working the said mill, which could not otherwise be worked, upheld, maintained and continued said dam.

Demurrer: The defendant claims an easement in plaintiff's land without showing any right, or how he acquired it; that such easement is not stated to have been granted by deed, nor that it was given to W. G. and his assigns, nor shews that plaintiff licensed defendant to uphold the dam; or, if that is meant, leave and license to defendant, and not the evidence of it, should have been pleaded.

Freeman, for demurrer, contended that what the defendant sets up is not a mere license, but he is claiming an easement in the plaintiff's land, which can only lie in grant, and no deed is shown by which such an interest can pass. He referred to *Wood* v. *Leadbitter*, 13 M. & W. 838, and *Robinson* v. *Fetterley*, 8 U. C. R. 340.

Vankoughnet, Q. C., contra.—*Wood* v. *Leadbitter* does not apply. A license to do a thing on a man's own land does not require a writing or deed—*aliter*, if it be to do something on another's land—*Winter* v. *Brockwell*, 8 Ea. R. 308; *Liggins* v. *Inge*, 7 Bing. 682. If the dam was lawfully put up, the defendant is not bound to take it down. This is a case of a license coupled with an interest, and therefore irrevocable. Law Mag., No. 68, Aug. 1845, p. 129.

Freeman, in reply.—The only interest that can be connected with the alleged license, is the interest in the money expended in putting up the dam; defendant upholds the dam, and there is at least no license as to *him*.

ROBINSON, C. J.—The plaintiff complains that he is the proprietor of land, through which a stream runs down to and through certain other lands mentioned in the declaration; and one Graham having wrongfully erected a dam across the stream on the said land, below the plaintiff's land, this defendant aforesaid wrongfully and injuriously continued and maintained the said dam so wrongfully erected by Graham, and thereby occasioned the water of the stream to flow back on the plaintiff's land.

The defendant pleads, that Graham being in possession of the land below the plaintiff's, and desiring to erect a mill-dam upon it, the plaintiff at his request gave him leave to erect the dam mentioned in the declaration; that Graham under this leave erected the said dam and put up a mill at great expense; that he the defendant afterwards purchased the said land from Graham, with the said dam and mill thereon,

and hath kept up and maintained the said dam, because the same was necessary for the working of his mill, &c.

The plaintiff demurs to this plea as being no defence, for that it amounts to an attempt to set up a title to an easement without any foundation by deed, and because it is an argumentative plea of license by merely setting out evidence without asserting that the plaintiff did give leave, &c.

The plaintiff has taken an exception to the defendant's plea, in point of form, which he did not press upon the argument, and I do not think it is a good objection. The cause of demurrer to which I refer is, that the plea sets out evidence merely of certain facts which the defendant relies upon as proving a license in effect; whereas, if they amounted to a license, the defendant should have pleaded a license in the usual form. There are several cases in the books, in which the property of the person giving the license has changed after the license was given, and the plea is framed on the same principle as this plea. I have not found one in which the property of the license has changed hands, and when consequently it is not the licensee who sets up the license, but one succeeding to his property. The same reason, however, must apply in both cases, making the plea special. The defendant in this case could not have pleaded with truth that the plaintiff allowed him to build the dam, or the mill which depended on the dam; nor could he plead that the plaintiff had given him leave to continue a dam which had been wrongfully erected by Graham, because neither would have been true. His defence is that the dam was built by Graham, not wrongfully, as the plaintiff alleges, but with the express leave of the plaintiff; that confiding in that leave, Graham had at great expense built the dam, and a mill which would be useless but for the dam; and that the defendant is now the assignee by purchase of the mill and dam. He maintains that under such circumstances the plaintiff cannot meet him as a trespasser, for continuing the dam erected by Graham with his permission.

As to the substantial part in the case, there are some authorities which seem to determine that in a case like the present the plaintiff must at least have requested the defendant to abate the nuisance before he could treat the continuing it as a wrong; but the defendant contends that it is not in the power of the plaintiff to revoke his license and insist on the dam being removed, and he has rested his case on the want of a request being shewn that he should pull down his dam.

I think the defendant is supported by authority for what he contends for, and that his plea does set up a good defence. There are two distinctions which must be kept in view, otherwise, in examining the

English authorities, there may appear to be an inconsistency in the various decisions, when in truth they are all reconcilable with each other, if the difference of circumstances be attended to. The defendant here is not sued for having done anything on his neighbour's land, but for continuing wrongfully a dam on his own land, which the plaintiff could not complain of unless for the injury which it occasions by backing the water on him. And in the next place, the defendant is only defending himself against an action of trespass, by setting up that the erection which the plaintiff complains of as being injurious to him, was put up with his leave, and therefore not wrongfully. If he were plaintiff, and standing upon a right of privilege which he claimed to have acquired on the land of the other party, and were complaining of his right or privilege being obstructed, and claiming damages on that account, then he would be under the necessity of showing a grant by deed as the foundation of his right, and could not rely on a mere parol license as conferring such a right. If, for instance, Graham had obtained a parol license from Beaver, the now plaintiff, for digging a raceway through Beaver's land, in order to bring down the water more advantageously to his (Graham's) mill; and if, after he had dug the raceway and built his mill, Beaver had stopped up the race or turned the water from it, and Graham were in consequence bringing an action against Beaver for this obstruction as an infringement on his right, he would fail, because his action would be grounded on a supposed right to an easement in Beaver's land, and he must show a good legal title to that easement. In that case he would be relying on the parol license as a proof of a subsisting legal right, whereas in the case now before us the defendant is claiming nothing; but, being sued as a wrong-doer, he sets up the alleged license as a reason why the plaintiff cannot treat him as a wrong-doer. He shews him estopped by his own consent from complaining of that as an injury which was done with his sanction. It is quite true that if a defendant can in such a case protect himself by the parol license against damages, he does undoubtedly establish the right; and if the other party can obtain no redress for the nuisance, the effect is the same as if he had made a grant of the privilege or easement by his deed. This is noticed in several cases, but it is not admitted to be a reason why the defence should not prevail.

The case of *Liggins* v. *Inge* (7 Bing. 690), in my opinion, fully sustains this defence; and *Wood* v. *Leadbitter* (13 M. & W. 838) does not interfere with that decision. It was expressly declared by the court in the latter case, that they were not denying the authority of *Liggins* v. *Inge*, and of *Winter* v. *Brockwell* (8 Ea. R. 308), which proceeded

on the same principle. They considered that class of cases as perfectly distinct from *Wood* v. *Leadbitter*, as they evidently are, for the reason I have mentioned.

This plaintiff in effect rests his action on the right which he has to have the water of the stream flow unobstructed in its natural course through the defendant's land, but he may have precluded himself by his conduct from insisting on that right, by being himself a party to that obstruction. If this plea is no defence, then it would equally be no defence if the defendant had paid the plaintiff a large sum of money for his permission to build his dam; or if the plaintiff had aided, as perhaps he did, in its construction, or had not merely assented to its being built, but had persuaded and urged the defendant to erect it, which he might in many such cases reasonably do, from a desire to have a mill built in his neighbourhood, which might be a great convenience to himself, and tend to enhance the value of property. According to what the plaintiff contends for, if all or any of these things had taken place, the plaintiff might nevertheless not merely revoke his license, and insist on the defendant pulling his dam down, and on his refusal sue him as a wrong-doer for its continuance, but might sue him at once as a wrong-doer, without any revocation or request to pull the dam down. The argument is, that in resisting this action on the plea of license, the defendant is setting up a right to an easement in plaintiff's land, which right he cannot hold unless by deed; that if the plaintiff can recover no legal damages for the injury, he is in the same situation in effect as if he had granted the privilege by deed; and that a party cannot for any purpose, or in any shape, advance a permission to erect what would *prima facie* be a nuisance in his neighbour's land, unless he can shew a deed granting him the privilege. I believe my brothers have formed that opinion; but I think the law is otherwise, and that the case of *Liggins* v. *Inge* establishes a clear distinction, which applies precisely in the case, and which distinction is in no degree interfered with by the decision of the court in *Wood* v. *Leadbitter*, nor by the language of the judges in that case. Indeed they expressly declare that their decision had no bearing on that case, nor on *Winter* v. *Brockwell*, for that these cases proceeded on a different ground, as in fact they do, and upon a ground which it appears to me equally applies in the case now before us. An American commentator on *Wood* v. *Leadbitter*, in a note appended to the American edition of the report, observes, that under any view of the law there would seem to be no doubt that a license will form a valid defence to an action brought to recover damages for an act done before revocation, although of a nature, if continued, to amount to an easement. *Liggins*

v. *Inge* goes further than this, for there Lord C. J. Tindall says: "We think the operation and effect of the license, after it has been completely executed by the defendant, is sufficient, without holding it to convey any interest in the water, to *relieve* them from the burthen of restoring to its former state what has been done under the license, although such license is countermanded, and consequently that they are not liable to an action as wrong-doers for persisting in such refusal;" and his Lordship further says: "This is a license to construct a mill, which is attended with expense to the party using the license; so that after the same is countermanded, the party to whom it was granted may sustain a heavy loss. It is a license to do something that in its nature seems intended to be permanent and continuing; and it was the fault of the party himself, if he meant to reserve the power of revoking such a license after it was carried into effect, that he did not expressly reserve that right when he granted the license, or limit it to its duration. Indeed the person who authorises the mill to be erected, becomes in some sense a party to the actual erection of it, and cannot afterwards complain of the result of an act which he himself contributed to effect."

Fentiman v. *Smith* (4 Ea. R. 107), and *Hewlins* v. *Shippam* (5 B. & C. 221), shew the distinction I have adverted to between a case in which the plaintiff is suing for damages for an injury resulting to himself from an act which he has permitted; and a case in which the person giving the license is made a defendant in consequence of his doing some act on his own land which the other party contends he has disabled himself from doing—not by any deed he has made, but in consequence of a mere verbal license. And what Lord Ellenborough says in *Fentiman* v. *Smith*, that the permission not being by deed was a mere license, and revocable at any time, though no doubt correct as applied in that case, if it were meant as an assertion that a license must in all cases be revocable at pleasure, as well when it has been executed at the expense of the licensee as when it has not, would be inconsistent with many later cases, and with every text writer, I believe, that has written on the subject. He doubtless never meant to be so understood, as his own judgment, in *Winter* v. *Brockwell*, clearly shews.

I am strengthened in the opinion which I have expressed by the following authorities:—*Aldred's* case (5 Co. 57 b); *Brent* v. *Haddon* (Cro. Jac. 555); Crabbe on Real Property (secs. 512, 513, 526); *Wallis* v. *Harrison et al.* (4 M. & W. 538); by that passage in Mr. Justice Bayley's judgment in *Hewlins* v. *Shippam*, in which he says: "Upon these authorities we are of opinion that although a parol license might be an excuse for a trespass till such license were countermanded,

that a *right and title* to have passage for the water for a freehold interest required a deed to create it; and that as there has been no deed in this case, the present action, which is founded on a right and title, cannot be supported." I refer also to Lord Abinger's judgment in *Carrington* v. *Roots* (2 M. & W. 248); to Baron Hullock's judgment in *Harvey* v. *Reynolds* (12 Price, 724); *Cocker* v. *Cowper* (1 C. M. & R. 418); *Bryan* v. *Whistler* (8 B. & C. 288; 2 Man. & Ry. 318); 3 Stark. Ev. 748; *Doe Foley* v. *Wilson* (11 East. 56); *Taylor* v. *Waters* (7 Taunt. 374); *Thomas* v. *Sorrell* (Vaughan, 351); *Rex* v. *Horndon on the Hill* (4 M. & S. 562); *Wood* v. *Manley* (11 Ad. & Ell. 34); *Webb* v. *Paternoster* (Palmer, 71); *Mason* v. *Hill* (2 Nev. & Man. 757); *Bridges* v. *Blanchard* (3 Nev. & Man. 695); 2 Saunders, 113 a. b.

I consider the case of *Bryson* v. *Whistler*, as reported in 2 M. & Ry. 318, immaterial to the present question, because there the licensee was attempting to support an action as upon an acquired right—not resisting an action of trespass, which makes all the difference. *Rex* v. *Inhabitants of Horndon on the Hill* is, in my opinion, inapplicable for the same reason, though not applying exactly in the same way. Lord Ellenborough's remarks on it, that a license was not a grant, and could be recalled immediately, could not be meant to assert that all licenses in such cases, whether executed or not, may be revoked, and that such revocation will put an end to its effect for all purposes; because nothing could be more expressly against such a position than his own judgment in *Winter* v. *Brockwell;* and the current of authority is the other way. In the case, besides, of *Rex* v. *The Inhabitants of Horndon on the Hill*, the person licensed was not resisting an action brought against him for using the alleged license; the question was, whether a legal interest had been acquired under the parol license, such as could confer a settlement under the poor law. It is true that in *Williams* v. *Morris* (8 M. & W. 493), the Court of Exchequer intimates a doubt in regard to some of the cases, though not those to which I have chiefly referred; but if they had held in that case that a license to do an act on a party's own land, which may in its consequences injure the licensor, could be revoked at pleasure, even after it had been created at the expense of the licensee, so as to leave him liable in trespass or case for the consequences of an act done with permission of the party complaining, I should not have felt justified in following a single decision to that effect in opposition to *Liggins* v. *Inge*, and the many cases decided both before and after that case on the same principle—still less to reject those decisions in reference to a mere doubt expressed.

It may be said with reason that a man's right to the full enjoyment

of his property seems very unsafe, if the right may be even to this extent interfered with by setting up proof of a mere parol license; and it might have been on the whole better if the law had allowed no attention to be given for any purpose to an alleged verbal permission of this kind, but had rejected all evidence less than a solemn instrument under seal; yet many cases might be stated in which life and liberty, and rights of property of much greater value than are likely to be involved in any question of this kind, are left subject to be affected by oral testimony; and, at all events, for the purpose of protection against an action, or for a wrong done, the legislature has not in such a case insisted on a written license, nor do I think the common law does. In *Carrington* v. *Roots* (2 M. & W. 254), it was held that a contract for the sale of an interest in land, without a note in writing, may operate as a license so as to excuse the entering of the purchaser on the land, though it could not be made available in any way as a contract. There the plaintiff was standing on his parol contract, as confirming an interest which he insisted would give him a right of action against the defendant, who had acted in disregard of it. "It would be a different case," they said, "if the plaintiff had been sued by the defendant in trespass. There the argument might have been available in answer to a trespass by setting up a license; not setting up the contract itself, as a contract, but only shewing matter of excuse for the trespass:" that appeared to them the whole extent to which the plaintiff could avail himself of the contract. If the requisition of a positive statute can be thus relaxed, I think *a fortiori* that principle of the common law can be to the same extent which requires a deed as the foundation of a right to an easement. I believe I have the misfortune to differ from my brothers in my view of this case, and I do so with some distrust of my opinion, because there are many dicta to be met with in the adjudged cases, that if taken literally and applied indiscriminately, without reference to the facts of the case under consideration, would shew my view to be untenable, and would equally shew the judgment in *Liggins* v. *Inge*, and in many other adjudged cases which have to this moment stood unquestioned, to be against law. But I have met with no decision which, in its effect, when the circumstances are attended to, seems to me to be at variance with the conclusion I have come to.—Addison on Contracts, 85-6.

The case of *Andrews* v. *Adams*, reported in 15 Jurist, 149, does not, I think, conflict with *Liggins* v. *Inge*, and that class of cases, though it was cited as establishing a contrary doctrine. It resembles the present case, however, in an important particular, in which most of the other cases cited differ from it. In that case the person licensed was not, any

more than in this case, setting up the alleged license as conferring upon him an actual legal title to an easement *in alieno solo:* he was not, as plaintiff, claiming under his license a real interest which he sought to enforce; nor claiming damages for an interference with such supposed legal interest.

He was merely, as in this case, defending himself against a claim made upon him for damages as a wrong-doer. In that respect the two cases are alike; and it is also true that in that case the license was held to be inadequate to protect the defendant, and upon the principle that an easement in another person's land could not be granted by deed. That was not the principal point in the case, however, which was decided on technical points of pleading; but the effects of a license as a defence was raised in the case, and was discussed at the time, and disposed of in the judgment of the court. The plaintiff had declared that he had of right a certain pew in the parish church, by reason of his inhabiting a certain dwelling house; but the defendant unlawfully, without his leave, entered into the pew during divine service, and disturbed him in the enjoyment of it, for which he claimed damages. The defendant, in a special plea, set forth a special agreement between plaintiff and defendant and another person, then church-warden of the parish, by which the plaintiff, having a larger pew than was necessary for him, allowed the church-wardens to partition off the pew into two parts, and to occupy one of the parts so divided; and alleged that they did so divide the pew at some expense, and did the act complained of after and in pursuance of that agreement, and of the license thereby given to them. The plaintiff, in a replication to this plea, which replication was held bad in point of form, set forth, among other things, that as to a part of the trespasses complained of, the license in the plea mentioned was revoked before they were committed. It was contended on the argument that the license could not be revoked after it had been acted upon and expenses incurred; and for that the counsel relied, not on *Liggins* v. *Inge*, or *Winter* v. *Brockwell*, but on *Wood* v. *Leadbitter*, I suppose as admitting that principle by implication. The counsel on the other side insisted that the right to a pew can only be claimed as appurtenant to a messuage, and therefore that the license would be revocable notwithstanding the church-wardens had incurred expense in erecting the partition; and the license, he said, could only be an answer to an action for anything done under it, so long as it remained unrevoked.

Mr. Justice Paterson, in delivering the judgment of the courts, says no more than this in relation to that point of the case:—"A further

question arose in the course of the argument, as to the right of the plaintiff to revoke the license or agreement. The law on this subject is elaborately and conclusively laid down in the case of *Wood* v. *Leadbitter* (13 M. & W. 838), and it is clear that, as there was no deed in this case, and therefore no grant, the plaintiff might revoke the license, notwithstanding the expense the defendant had incurred, unless the defendant's character of church-warden makes any difference (which, under the pleadings, he did not think it did). And this being so," his Lordship said, "*the rule of law, as laid down in Wood* v. *Leadbitter, must apply.*" Now, we must consider that in the case of *Andrews* v. *Adams*, the defendant was not justifying anything done on his own land, but was insisting on a right to enter into and remain on the plaintiff's premises—as in *Wood* v. *Leadbitter*, the plaintiff was claiming a right under a verbal license to go into and remain on Lord Eglington's premises. The cases are similar in principle, and are like *Cooper* v. *Barber* (3 Taunt. 99), *Hewlins* v. *Shippam*, and many other cases; but clearly distinguishable from *Liggins* v. *Inge* and *Winter* v. *Brockwell*, and that class of cases, where the defendant is complained of, not on the ground of his having directly entered on the plaintiff's land, which in its consequences only was injurious to the plaintiff. The Court of Queen's Bench, in deciding in *Andrews* v. *Adams*, profess only to act upon the rule in *Wood* v. *Leadbitter;* and there the Court of Exchequer, which gave the judgment in *Wood* v. *Leadbitter*, expressly declare that they had not adverted to the case of *Winter* v. *Brockwell*, or *Liggins* v. *Inge*, or that class of cases, because they were decided on grounds inapplicable to the case of *Wood* v. *Leadbitter*, then before them, and were admitted not to bear upon it. Nothing, therefore, can be clearer than that the decision in the late case of *Andrews* v. *Adams* was not considered or intended by the court to overrule the case of *Liggins* v. *Inge*, or to conflict with it in any degree.

I see no ground for any solid distinction between the case now before us, and that of *Liggins* v. *Inge*, which appears to me fully to cover this case; and I have not found the authority of *Liggins* v. *Inge* questioned, so far as anything laid down in it was necessary to the decision of that case, or of the present.

Besides, no revocation of the license is alleged in this case. The plaintiff claims damages from the defendant as a wrong-doer, and because he keeps up a dam which had been erected by the former proprietor in the land which is now the defendant's. *Prima facie*, the defendant could place any erection he pleased on his own land, or keep it up as long as he pleased, as was said by Mr. Justice Lawrence in

Cooper v. *Barber* (3 Taunt. 110):—"He may pen the water as he will, till he does a damage to his neighbour; but the law is that he must so use his own as not to prejudice his neighbour."

Therefore this plaintiff was driven to shew why he complained of this dam, and his allegation is that it obstructs the natural flow of the stream through the defendant's land, and occasions the water to run over upon his (the plaintiff's) land. The alleged wrong is the obstructing the flow of water through the defendant's land, of which the damage to the plaintiff is the consequence.

The defendant's answer is, that thus interfering with this run of water through his own land is not a wrongful act on his part of which the plaintiff can complain, although it may in its consequences be injurious to him, because the person who built the dam and the mill had the plaintiff's leave for doing it, in order expressly that the water might be received by it for the purpose of working the mill; and therefore, if it do occasion him damages, it is *damnum absque injuria*. To shew such a license he requires no deed, for he is not claiming directly an easement in the plaintiff's land, but answering himself for the consequences to the plaintiff of a continued obstruction existing in defendant's own land.—Selwyn's N. P. 1143, 9th edition; Crabbe on Real Property, sec. 526.

It makes no difference, I think, where the license has been executed in a manner attended with expense, that it is not the original licensee who sets up the defence, but his assignee, for the latter could be no more compelled to pull down the dam than the former. Whether the plaintiff in such a case as the present could or could not revoke the license, and after such revocation claim damages if the nuisance were not abated, it is not necessary in this case to consider, for no revocation is alleged.

The weight of English authority, I think, is against the power to revoke, at least without tendering a reimbursement of the expense incurred in erecting, with the permission of the party, a work intended to be permanent; but there are dicta the other way, and doubts thrown out whether the language of Chief Justice Tindal, in the case of *Liggins* v. *Inge*, does not in that respect go farther than is warranted. I believe it has been held in some of the courts of the United States, that on principles of common law the license is revocable.—Kent's Commentaries, License.

We had in this court lately a case of *Robinson* v. *Fetterly* (8 U. C. R. 340), in which the effect of a parol license in a case precisely like the present was dismissed on a motion for a new trial; but as the

alleged license was not made out in evidence, the court on that ground decided for the plaintiff. I think the judgment in this case should be for the defendant on the demurrer.

DRAPER, J.—I do not think the plaintiff, in his declaration, is to be treated as asserting any right or easement in or over the lands of the defendant, when he says that the water of the stream which flows through his land into and across the defendant's lands, should flow without interruption in its natural course. He is asserting a right arising *ex jure naturæ* incident to his proprietorship of his own lot, not claiming an easement *in alieno solo*, and the right he asserts is of a character which would not be extinguished by unity of possession. He asserts this right merely by way of inducement to the injury of which he complains, which is an overflowing of his lands by the defendant's act in keeping up a dam previously erected on No. 24 across the stream. The overflow of the land of the plaintiff is justified by the defendant, who distinctly claims a right so to keep the water raised. He thereby in effect asserts a right to be exercised upon and over plaintiff's land. The plaintiff is not complaining of any injury done to his right in the water of the stream, or to his right to have it flow by and through its natural boundaries and channel. His cause of action is the injury to his land; and if the stream did not cross the plaintiff's land at all, but came through a channel over other lands to defendant's, and was there penned back by a dam erected by defendant so as to overflow the plaintiff's land, he would have precisely the same right and form of action, declaring on the possession of his land. The inducement seems to me inapplicable to the injury subsequently complained of, for the former refers in strictness to the right to the flowing water of the stream, which right is not shewn to be invaded; the latter, to the plaintiff's enjoyment in his own land, not being part of the watercourse as usually or naturally covered by its waters, and the plea claims a right so to interfere, admitting the plaintiff's ownership.

The right so claimed is in the strictest sense of the word an easement; which, as an incorporeal hereditament, could not pass without deed, and is defined in terms *de la ley* privilege that one neighbour hath of another by charter or prescription, without profit.

Where there is a license by parol, coupled with a grant or pretended grant of something which is incapable of being granted otherwise than by deed, then it is a mere license; it is not an incident to a valid grant, and therefore is revocable.

This seems to me to be the case here; and besides, it was only a license to G. No license to defendant is pleaded, and none is to be inferred from a parol license to G.

The case of *Fentiman* v. *Smith* is very much in point for plaintiff. The plaintiff complained of defendant's obstructing a tunnel built on defendant's land, through which water passed to defendant's mill. The tunnel had been built at plaintiff's expense, by parol agreement with defendant, who had even assisted in its erection, and afterwards refused to assent to its continuance. Lord Ellenborough held that the title to have the water thus flow over defendant's land could not pass by parol license without deed; that such a title was revocable at any time, and clearly gave no title in point of law. The case of *Rex* v. *Horndon on the Hill*, where a parol license to enclose a garden from a common was held revocable immediately, although it was urged the party had gone to expense in the enclosing, confirms the same view.

Hewlins v. *Shippam* is not to be distinguished from *Fentiman* v. *Smith* in principle; and Bayley, J., after citing it, states, "That although a parol license might be an *excuse* for a trespass till such license were countermanded, that a right and title to have passage for the water for a freehold interest required a deed to create it" And in reviewing *Webb* v. *Paternoster*, *Wood* v. *Lake* (Sayer, 3), and *Taylor* v. *Waters*, he says they were not cases of freehold interest; and in none of them was the objection taken that the right lay in grant, and therefore could not pass without deed. His observations upon the case of *Winter* v. *Brockwell* are more important to this case, because they appear at first to favour the principle involved in this defence. In that case the plaintiff complained that being lawfully possessed of a dwelling house, &c., into which light and air entered by means of a window from an area between said window and an adjoining house, by means of which area also noisome smells which came from the adjoining house evaporated, defendant wrongfully placed a skylight over the area above plaintiff's window, by means of which the light and air were prevented from entering plaintiff's window into his house, and the noisome smells were prevented from evaporating, and entered plaintiff's house. Not guilty was pleaded; and the defence was, that the area, which belonged to defendant's house, had been covered by a skylight as stated, with the express consent and approbation of plaintiff, obtained before it was done, who also gave leave to have part of the frame work nailed against his wall. After it was finished plaintiff objected to it, and gave notice to have it removed. Lord Ellenborough was of opinion that the license given by plaintiff having been acted on by defendant, and expenses having been incurred, could not be recalled—at least, not without putting defendant in the same situation as before, by offering to pay all the expense; and defendant had a verdict. A motion was made for a new

trial, and Lord Ellenborough said that he had looked at *Webb* v. *Paternoster* (Palmer, 71), which decides that a license executed was not countermandable, but only where it was executory, and the rule was not granted. Bailey, J., remarks on this, "That was not the case of the grant of an easement to be executed on the grantor's land, but a permission to the grantee to use his own land in a way in which, *but for an easement of the plaintiff's*, such grantee would have a clear right to use it."

Bryan v. *Whistler* shews, that though money be paid for an easement, and expenses incurred upon it and to use it, a deed is necessary to pass it.

But the most instructive case is that of *Wood* v. *Leadbitter* (13 M. & W.), in which the cases have been elaborately reviewed and commented on, and the difference between a mere license and a license coupled with a grant, is clearly pointed out. A mere license is revocable, and this whether it be by parol or under seal; for a license properly passeth no interest, nor alters nor transfers property in anything, but only makes an action lawful which, without it, had been unlawful. But a license *coupled with a grant* is irrevocable, and a parol license equally so with one by deed, provided that the grant is of something which may be granted without deed. "But where there is a license by parol, coupled with a parol grant of something which is incapable of being granted without deed, there the license is a mere license—it is not incident to a valid grant, and is therefore revocable."

Now, if the present plaintiff had cut a drain on his own land, in such a way as to draw off the water which overflowed his land, without drawing off the water from its channel within and between the natural banks of the stream (which may probably pass through plaintiff's land before it reaches defendant's), it is clear that no action would lie against him for that act, although its effect would be to render valueless the defendant's mill, because there was only a parol license to erect the dam; for the license would be in its very nature coupled with a grant of an easement over the licensor's land, viz., to overflow it; which grant not being by deed was void, and the license would consequently be revocable.

The case of *Wood* v. *Leadbitter* is referred to and confirmed by the Court of Queen's Bench in *Andrews* v. *Adams* (15 Jur. 149, and 15 Q. B. 284). The court, speaking of a license or agreement on the part of the plaintiff to or with defendant, that the latter might divide a pew in a parish church belonging to plaintiff, and might enter and occupy a portion so divided off, remark, "It is clear that there was no deed in

the case, and therefore no grant; the plaintiff might revoke the license, notwithstanding the expense the defendant had incurred." This last case resembles the present in one feature, in which the other authorities cited differ from it, namely, that the party through whose license the expense was incurred and the act done, is the party who complains that his rights are infringed by those who incurred the expense and did the acts, the latter of which are the subject of the suit, and were done after the license was revoked. I refer also to the late case of *Taplin* v. *Florence* (15 Jur. 402), and *Perry* v. *Fitzhowe* (8 Q. B 757).

Winter v. *Brockwell* and *Liggins* v. *Inge* are the leading cases of a class most apparently at variance with the conclusion at which I have arrived. I might perhaps content myself with saying that this case does not fall within the principle of those decisions, which I think goes no farther than to establish that a parol license may extinguish an existing easement over the land of the licensor. In *Wood* v. *Leadbitter* the court say: "We do not advert to the cases of *Winter* v. *Brockwell* and *Liggins* v. *Inge*, or other cases ranging themselves in the same category, as they were decided on grounds inapplicable to the case before us." Both those cases resemble the present, as they did the cases of *Wood* v. *Leadbitter*, *Andrews* v. *Adams*, *Rex* v. *Horndon on the Hill*, *Cocker* v. *Cowper*, and others before cited, in this respect, that the parol license had been acted upon, and expense incurred by the license; and both differ from the present case in the nature and character of injury which was complained of. They both resemble the present case in this respect, that the act licensed to be done was an act to be done upon the soil of the licensee, for which (not referring to the consequences of the act) no license was necessary; and both differ from the present case in this, that in them the consequence of the act was only to deprive the licensor of an easement which he might otherwise have of right enjoyed, whereas in this case the consequence of the license is to confer on the licensee an easement to be enjoyed in and over the land of the licensor. In giving judgment in *Liggins* v. *Inge*, Lord Chief Justice Tindal guarded himself most carefully from being supposed to decide that a parol license would convey an easement. He admits that if it were necessary to decide that a right or interest in any part of the water of the stream—which would in its natural channel and course flow from the defendant's mill to the plaintiff's, and which had been diverted by defendant—passed from plaintiff's father to defendant by the parol license of the plaintiff's father, the court would be met by the rule of the common law relative to grants of incorporated hereditaments, or by the Statute of Frauds relative to interest in land, and says, "It can-

not be denied that the right to the flow of the water formerly belonging to the owner of the plaintiff's mill, could only pass by grant as an incorporeal hereditament;" from which I certainly infer that if the defence could not have been sustained without holding that the defendant acquired that right to the flow of water, it must have failed, because there was no grant. But he goes on to state the ground on which the court think the defence maintainable; and it is not because the plaintiff is considered as *quasi* estopped by his license, or because he is plaintiff complaining of the consequence of an act authorized by himself, as causing him damage. The reason given may be founded on a subtle distinction, but it is nevertheless appreciable: "We think the operation and effect of the license, after it has been completely executed by the defendants, is sufficient, without holding it to convey an interest in the water, to relieve them from the burden of restoring to its former state what has been done under the license, though such license is countermanded. We do not consider the object, and still less the effect, of the parol license to be the transfering from plaintiff's father to the defendant any right or interest whatever in the water, which was before accustomed to flow to the lower mill, but simply to be an acknowledgment on the part of the plaintiff's father that he wanted such water no longer for the purposes of his mill; that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir which he then consented should be erected by the defendant." I am unable to see how this language and this distinction can apply to the present case, where the injury complained of is the continued overflowing of the plaintiff's land; or how the defendant can justify this act, under the license pleaded, without treating the license as transferring to him a right over so much land as he overflows; or how the plaintiff's license, in this case, can be treated simply as an acknowledgment analogous to that spoken by Chief Justice Tindall, in regard to water which never had flowed on to the plaintiff's land, so as to give him the actual usufruct of it. Here the defendant claims a right over plaintiff's land to overflow or occupy it with water. This is an easement, which requires a grant at common law, or an interest in lands, which requires a deed or writing under the Statute of Frauds. And therefore I think this case distinguishable from these or other cases ranging within the same category, as the Court of Exchequer also considered *Wood* v. *Leadbitter*.

It therefore appears to me clear that the plaintiff might revoke the license in this case, and after having revoked it, might bring this action. So far, therefore, as that question affects the decision of this demurrer,

I think the plaintiff should succeed; and if the defendant shewed a license to himself, we should have to decide whether a revocation before action brought should not have been replied, and that the license before revocation would form a valid defence.

But this plea shews only a license to Graham, and there is nothing shewn to transfer the license to Graham to this defendant. The principle of *Wallis* v. *Harrison* is applicable here, and entitles the plaintiff to judgment. The plea admits the injury complained of as consequential to the upholding the dam, and justifies the upholding because the plaintiff licensed Graham to build it—not averring anything to shew the license extended to any one but Graham, and treating such license as vesting in himself as purchaser and occupier of the lot No. 24 from Graham, without shewing that it (*i. e.* the license) was transmissible; and if so, that it was in fact transferred and conveyed to himself. I do not suppose that the facts would enable the defendant to amend his plea, for I do not suppose he could shew more than what he has pleaded, viz., a permission to Graham to erect the dam on his own lot No. 24; that Graham did erect it, and was at considerable expense in erecting it; that defendant has succeeded Graham in the ownership and occupation of No. 24; and that plaintiff's lot, No. 25, is in consequence of the dam overflowed and damaged. They shewed no more than a license to Graham to do an act which, inevitably affecting plaintiff's land, must be considered a license coupled with a grant; the license and grant being at least co-extensive in duration, as we must infer, with Graham's occupation of the premises, which might be for his life. It is therefore a grant, in the nature of freehold, of an easement over plaintiff's land, created without deed, and therefore void; and then the license, being coupled with a void grant, is a mere license, and revocable as against Graham, and not assignable; for, disconnected with any valid grant, there is nothing to shew it more than a personal license.

And, in speaking of the alleged consent of the plaintiff to Graham as a *license* to do an act on his own land, the terms used rather tend to a confusion of ideas. Speaking abstractedly, there was no necessity for Graham to obtain a license to erect a dam on lot 24, of which he was owner. He only required a license to do the act when it began to affect lot No. 25. It was to overflow a part of that lot for which he wanted permission, not simply to erect a dam on his own; for if he did not overflow any land but his own, the plaintiff's assent would be a mere nullity, for the plaintiff had no interest or right in the land affected by the erection. To make it a license given by plaintiff, it must be a license to do an act which would affect some right or interest possessed

by plaintiff. And this is the use to which it is sought to apply it—for it is pleaded as affording a justification to a right to be exercised over plaintiff's land—viz., covering it with water. Such a license would not be appurtenant to lot No. 24, nor yet to the mill. Assuming it to have been legally granted and irrevocable, it must also be legally transferred before the defendant could avail himself of it. But the defendant only pleads that he has acquired No. 24, and the well and dam so erected thereon, by purchase from Graham, and is the occupier thereof, succeeding him; and, because the mill could not otherwise be worked, justifies upholding the dam. He seems in fact to claim the right as incident *to the possession of the mill*, because the plaintiff gave Graham a parol license, which was executed. I think the plea bad on three grounds: firstly, that the license being coupled with a grant of an easement, that grant not being by deed is void, and the license is consequently revocable, although expense was incurred in executing it; secondly, that, being a revocable license, it was also a license, for all that is shown, given to Graham personally, and it ceased when Graham ceased to occupy the property; thirdly, that the right to overflow plaintiff's land is claimed as incident to the possession of the mill on No. 24, but the plea does not shew the right to form such an incident, either by the manner of its creation or otherwise.

BURNS, J.—The defendant in this case does not answer the plaintiff's allegation that the water was caused to flow over the usual and natural banks of the stream, and that it flowed over and flooded the plaintiff's land, and destroyed his trees, fences, &c., in any other way than by stating that the plaintiff sanctioned the building of a dam by Graham on Graham's own land for the purpose of working the mill. The plea is artfully framed, to avoid if possible any conclusion which might be drawn that the defendant expressly claimed any interest in or easement over the plaintiff's land; but, unless in truth it does amount to something of that kind, it is no answer to the action. Graham had a perfect right to build as many mills and as many dams on his own land as he pleased; and so long as they occasioned no injury to the plaintiff, he could not complain. It would be insensible to suppose that it was necessary for the plaintiff to give his consent to Graham to do that which required no consent; and to do what he had a right to do; and therefore we must understand the plea as justifying what the plaintiff complains of, namely, an injury to the plaintiff's lands, by reason of the mill-dam raising the water upon those lands; and we must understand the defendant to say the plaintiff cannot complain of that injury because Graham had a license from the plaintiff to do that which caused him the

injury. If the plea is then to be considered as a justification of the injury complained of, it amounts to the setting up of a right to overflow the plaintiff's land by the plaintiff's own consent; and this, I think, is the proper footing upon which to place the plea; for if not considered in that way, it is no answer to the declaration.

The proper way, then, to consider it is in two points of view; first, whether the plaintiff could have maintained an action against Graham, notwithstanding the permission which he had given; and, secondly, whether, if Graham could successfully resist the action, can the defendant do so?

If the action were against Graham, it probably would be found necessary, to a plea of leave and license given by the plaintiff, to shew that it was revoked before the action brought; because, before revocation, Graham could not, perhaps, be said to be a wrong-doer; at all events, until a revocation, the plaintiff could not be entitled to damages, though perhaps he might be able to maintain his action strictly, were it necessary to do so, to save his right as against the Statute of Limitations; and if necessary to shew such revocation, it would come by way of replication. The facts, as shewn in this plea, are, that the license was executed, and that Graham incurred great expenses and outlay, and that it was not competent for the plaintiff to revoke after that. This involves the consideration, in what light the plaintiff's act is to be looked upon, and how to be treated, and whether it confers a right on Graham, or only disables the plaintiff from suing in the face of his own license. Firstly, what right was conferred on Graham? The right to overflow plaintiff's land was an easement, an interest in it, and it could no less amount to that because what Graham was to construct was to be on his own land; and if the effect of what he was to do on his own property was to create a permanent right to overflow the plaintiff's land in order that he might employ his erections fully, it was no less an easement for that purpose than it would have been to cut a ditch or drain for the purpose of using the water to better advantage. If then it was an easement, no interest could be gained but by deed. Suppose the plaintiff in this case, after Graham had built the dam and erected the mill, had thought fit to divert the surplus water which overflowed his land through some other channel, and that Graham could not have worked his mill, would Graham have been permitted, by means of the parol license, to maintain an action against the plaintiff? I take it to be clear that in such case no action could have been sustained; and if so, that must prove that no interest was conveyed to Graham in or over the plaintiff's land, or passed by the plaintiff's license to Graham to

build a dam on his own land. What is said by Mr. Justice Bayley, in *Hewlins* v. *Shippam*, is this: *that though a parol license might be an excuse for trespass till such license were countermanded, a right and title to have a passage for the water is a freehold, which requires a deed to create it.* I can see no distinction between a right and title to have a passage for water to flow through land, and a right and title to back the water upon the same land higher than it would naturally flow. I take it to be clear that the parol license of the plaintiff conferred no right upon Graham to an easement to overflow the plaintiff's land.

If no right was conferred upon Graham, then, secondly, did the plaintiff's license deprive himself of suing Graham in consequence of the injury? I mean by this to take it as if no revocation could be made in consequence of the license having been executed; but this seems to me, after all, only the previous question in another shape. Putting aside the position of title acquired by occupancy or length of time, or discontinuance of possession, which would bar the proprietor, can the owner of a freehold deprive himself save by deed from the title to it, or the right to bring an action in respect of it—that is, where no tenancy exists? If the plaintiff were prevented from sustaining an action, this inevitable result must follow, that the license would gain title by lapse of time, supposing both the licensor and the licensee to live and occupy for twenty years. Many cases shew that a proprietor, though no damage can be shewn to have been sustained by him in consequence of the act of another, may maintain an action upon the bare right, if such right would be lost by twenty years' use or occupancy of something which would interfere with his right. It is not because the plaintiff may have sustained no injury, or that if he does sustain an injury by reason of his own license to another to do an act which produces the injury, that he therefore loses his right in his land, or altogether loses his right to sustain an action for asserting his title to it.—To prevent a plaintiff from bringing an action, is setting up the doctrine of an equitable estoppel. Now, though some American authorities favor that view, and some, on the other hand, are against it, I find no English authority which supports that position; but on the contrary, *Wood* v. *Leadbitter*, and *Andrews* v. *Adams*, fully decide, I think, that because one party has gone to expenses in consequence of the permission of the other, that of itself will not prevent an action being brought. When it is said that a parol license is not revocable when it is executed, it must be understood in the sense expressed in the judgment of the court in *Wood* v. *Leadbitter*, where the whole of the previous cases were reviewed, and it is said: "a license by parol

coupled with a grant is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol coupled with a grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license—it is not an incident to a *valid* grant, and it is therefore revocable.[y]—*Winter* v. *Brockwell*, and *Liggins* v. *Inge*, exemplify the principle. In these cases the plaintiffs claimed no interest in or on the soil or freehold of the defendants, but claimed an easement to themselves in respect to their own property, and the defence was that they had waived the right to enjoy that easement and induced the defendant to go to expenses in consequence of the permission given. The license or permission given required no grant by deed, and having been given by parol and executed could not be revoked, and the plaintiffs were prevented from sustaining any action. It is true that something was said in *Wallis* v. *Harrison*, giving countenance to the position that there was a distinction between executory and executed licenses in cases where it would require a grant by deed, but it was not necessary to decide the point, as Baron Parke says; and this matter certainly was most deliberately considered in *Wood* v. *Leadbitter*, and that case was approved by the court of Q. B., in *Andrews* v. *Adams*. In this case, however, it is different; the defendant claims a right to overflow the plaintiff's land, and he makes this claim on a parol license that Graham might build a dam to work the mill. The defendant can no more deprive himself of his interest in his lands without grant by deed than Graham could acquire such interest without deed.—*Wallis* v. *Harrison* shews that if the plaintiff here had conveyed his lands his vendee would not be bound by his promise; and I take it the same result must follow if the land had descended—viz., that the heir would not be bound. This shews that the license is not irrevocable; and if irrevocable, I see nothing in the cases which hold that the plaintiff could not himself revoke as well by other means as by selling the property. If the defendant cannot divest himself of his freehold interest in his land without deed, but retains a right to complain of his being prevented from using it to the best advantage, then is there in this case a revocation, or circumstances which are equivalent to it.—If the action had been against Graham, as before observed, and he had pleaded leave and license, it might have been necessary, if the plaintiff could not deny; then that he should shew the license had been revoked; but the action now is against a person to whom the plaintiff gave no license, and though the plaintiff did give Graham permission to overflow his lands, the question

is whether that permission is to be extended to the defendant by Graham's act, without the plaintiff being a party to it. And here again arises the question whether it is an easement or a mere license. A mere license is founded in personal confidence and is not assignable, but if coupled with that which is an easement, then it is more—it is a liberty, privilege, or advantage in land. Now it seems to me if the owner has given a license by parol only in or over his land, which is determined upon his granting his land, and that the vendee is not bound, it proves that it is no easement, but a personal license, which does not bind the land. The license rests merely in personal confidence between the two parties; and if so, I see no principle which admits that one party can transmit such a confidence by selling his land more than the other can by selling his. I can see no principle which should admit that Graham could sell his property to the defendant and thereby transfer to him that confidence which it must be admitted would end if the plaintiff had sold his land without a reservation. I have before endeavored to prove that the defendant's claim, if it is available, amounts to claiming an easement over the plaintiff's land, and this I think must have its origin by deed, as no right to prescription is here set up; and I have also endeavoured to prove that as against Graham the plaintiff would not be prevented from revoking, and again asserting his right; and if these positions be true, then it is a mere license, amounting to a personal license not assignable, and the defendant cannot stand in Graham's shoes and claim what he might have done—viz., that a revocation should be shewn before action brought. The personal confidence not extending beyond Graham, the defendant, the moment he acquired the property, became as against the plaintiff a wrong-doer.

This may be a hardship upon Graham, and operate restrictively upon the enjoyment of his property, but it is only one of many cases we see taking place every day—viz., that parties rest on the verbal understandings and contracts of persons, who afterwards take advantage of them. As Mr. Justice Bayley said in *Bryan* v. *Whistler*, "I am extremely sorry that an individual in the situation of the defendant, having received a pecuniary compensation for the grant of a privilege intended to be binding, at all events during his own incumbency, should afterwards keep the money and recede from his undertaking. But if the question of law be with him, his defence to this action must prevail." So long as we sit as a court of law, I can discover no reason, and certainly no English authority, why in a legal suit we should recognize defences on the ground of equitable estoppel. If the action were of an equitable nature, as some actions are said to be, then indeed

an equitable defence might be admitted; but in a purely legal action, as this is, it must be decided upon legal principles; and I see no legal principle which prevents the plaintiff from bringing an action for an injury to his lands, resulting from an injury done which he sanctioned, but in law was not bound by, when that injury is a permanent one, and the causing of which arises from a claim of an easement for which no deed has been granted. And, as the action is not against the person to whom the authority was originally given, the question of revocation does not arise; because, I think, the defendant cannot derive any benefit from it, not being assignable by the sale of the land.

Judgment for the plaintiff on demurrer.

IN RE SAMS V. THE CORPORATION OF TORONTO.

Authority of a judge in Practice Court—Construction of 12 *Vic., ch.* 81, *sec.* 155.

A Judge in Practice Court has no authority to entertain an application for quashing the by-law of a Corporation.

As to titles of city corporations under 12 Vic., ch. 81. "Corporation of Toronto" insufficient to designate the Corporation of the City of Toronto.—See 10 U. C. R. 492.

By 12 Vic., ch. 81, sec. 155, Corporations have *not less than eight days* to answer a rule *nisi* for quashing any of their by-laws. Therefore, a rule granted and served on the first Saturday in term is not returnable within that term.

(Q. B., T. T., 15 Vic.)

Mr. Philpotts obtained this term in the Practice Court a rule *nisi* for quashing a by-law of the City of Toronto, restraining persons from keeping shops in the city for the vending butcher's meat.

The rule *nisi* was issued from the Practice Court, and made returnable in full court here—being moved as in the Queen's Bench.

C. Gamble objected, in shewing cause, that the rule and papers were improperly intituled as in an application against "The Corporation of Toronto," there being no such corporation—that they ought to have been intituled as against "The City of Toronto."

2ndly. That the corporation could not be called upon so soon to shew cause against the rule, which was only granted on the first Saturday of term, and served on the afternoon of that day, and which therefore the corporation could not be required to answer during the term, there not being a full eight days left, to which they are entitled by 12 Vic., ch. 81, sec. 155. That clause provides, "that upon proof of service of a rule upon the corporation to shew cause, *within not less than eight days after such service*," the court may order any by-law to be quashed if illegal. He cited *Webb* v. *Fairmaner*, 3 M. & W. 473; *Pellew* v. *Inhabitants of Wonford*, 9 B. & C. 134.

ROBINSON, C. J., delivered the judgment of the court.

When the rule *nisi* was spoken to before us in term, it seemed to us questionable whether we could regularly proceed in such a case upon a rule *nisi* granted out of the Practice Court, which point we are bound to consider, although no objection has been taken on that ground.

On looking at the 155th clause of 12 Vic., ch. 81; 13 & 14 Vic., ch. 64; and the 9th clause of 12 Vic., ch. 63; and the 3rd clause of 13 & 14 Vic., ch. 41, under which the Practice Court sits, we do not think that such an application can regularly be made in that court. The jurisdiction in such cases is, by ch. 81, conferred on the Court of Queen's Bench, or Common Pleas, and we think authority is not given by the statutes to a judge of either court sitting in the Practice Court to entertain an application of this kind, not being a matter ordinarily determinable on motion, and the rule *nisi* asked for in such a case not being a rule or order in any cause or business "depending in either of the said courts" (*a*).

If we are right in this respect, it is of no consequence to consider the objections that have been made to the rule *nisi*. So far as any entitling may be necessary, I think the one adopted in this case would be improper; because "the Corporation of Toronto" is not only not the name of the corporation which passed this by-law, but it is a name no more applicable to it, for all that appears, than it is to the Corporation of the township of Toronto (*b*).

We apprehend, also that the defendants could not at any rate be compelled to shew cause on the last day of term, independently of an objection to taking a special argument on that day; for we think the words "within not less than eight days after service" mean the same thing as saying that the corporation shall have eight days *at least* to answer the rule, and they have not that if, being sued on one Saturday, they are compelled to answer on the next Saturday. They would only have eight days by reckoning the day of service as one of the eight, and making the last of the eight days also the day for answering. That

(*a*) The jurisdiction of the Practice Court is determined by the Con. Stats. U. C. ch. 10, s. 9, p. 33, and relates to the business of adding or justifying bail, discharging insolvent debtors, administering oaths, hearing and determining matters on motion, and making rules and orders in causes and business depending in either of the Courts.

(*b*) Under the statute in force when this application was made, the proper designation of the Corporation was *The Mayor, Aldermen and Commonalty of the City of Toronto* (12 Vic. c. 81, s. 82). Under the present statute, a more simple and uniform title has been adopted, and the title of each Municipal body now is *The Corporation of the County (or United Counties), City, Town, Village or Township (or United Townships) of*————

certainly would be giving less than eight days.—*Webb* v. *Fairmaner*, 3 M. & W. 475 (*a*).

The rule *nisi* would be objectionable, I think, for being thus made returnable too soon.

Per Cur.—Rule discharged.

MOORE V. JARRON.

Statute labour—Requisites of conviction.

A proprietor of land cannot be compelled to do statute labour in the township in which the land lies, unless he is himself resident there.

Where a form of conviction is not sanctioned by any express statute, it must be such as would be legal according to the principles of the common law; and in that case, a conviction which did not express that the party had been summoned, or that he appeared, nor that the evidence was given in his presence, cannot be supported.

(Q. B., T. T., 15 Vic.)

Declaration in trespass *quære clausam fregit*, with a count for taking a cow of the plaintiff's.

Plea, "Not guilty by statute."

The facts of the case were as follows:—On the 11th of September, 1848, the pathmaster for the township of Moulton made an oath before the defendant, who is a justice of the peace for the county of Haldimand, that the plaintiff, Moore, was entered on the road list of Moulton for four days' statute labour; that he had been duly warned, but had refused to work, and had done no portion of his statute labour.

On the trial a conviction was produced, whereby, on the 16th October, 1848, the defendant, reciting the complaint of the pathmaster, that the plaintiff had refused to perform four days' labour on the roads in Moulton, for which he stood rated on the list of the town clerk of Moulton delivered to the pathmaster, adjudged the plaintiff Moore for the said offence to forfeit and pay a fine of 1*l.*, being 5*s.* for each day which he was rated, and the costs of the proceeding, amounting to 11*s.* 9*d.*, being in all 1*l.* 11*s.* 9*d.*; and he ordered the said fine and costs to be paid to him, the said justice, in four days, or to be recovered by distress and sale of Moore's goods.

This conviction was filed with the clerk of the peace on the 23rd November, 1848. On the 26th November, 1848, this defendant, the

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(*a*) The present statute (Con. Stats. U. C. c. 54) re-enacts this provision. In *Perry* v. *Town of Whitby* (18 U. C. Q. B. 564) where the rule *nisi* was obtained near the end of term, and was made returnable eight days after service, and defendants appeared during the following term and objected that the rule should have been to show cause on a day certain, it was *held* that the objection—even if good—was waived by appearance.

justice, made his warrant under seal to one Penny, a constable, reciting the conviction, and that Moore had not paid the fine, and commanding him to distrain the goods of Moore, and if within six days he should not pay the 1*l.* 11*s.* 9*d.*, with the charge of distress and sale, then he should sell the goods, and pay the money to him, the justice, to be appropriated according to law, rendering the surplus to Moore on demand.

The facts on which the conviction was founded were, that Moore lived in the township of Canboro', but owned land in Moulton. He had performed four days statute labour in Canboro' for the year 1848, upon the call of the pathmaster for the township of Canboro'.

The jury gave a verdict for the plaintiff, and 4*l.* damages; and, by consent of parties it was reserved for the consideration of the court whether the conviction affords a legal justification under the plea.

The case was argued in Easter term.

Eccles, for the defendant, referred to 4 Wm. IV., ch. 4, secs. 3 & 20; 1 Vic., ch. 21, sec. 7; and cited *Rogers* v. *Jones*, 3 B. & C. 409; *Daniel* v. *Philipps et al.*, 5 Tyr. 295; *Mellor* v. *Baddeley et al.*, 2 Cr. & M. 675, reported also in 6 C. & P. 374.

Boulton contra.

ROBINSON, C. J., delivered the judgment of the court.

We think that the verdict, which has been given for as small damages as could be given under the circumstances, must stand. The conviction must have been intended to be made under our statute 1 Vic. ch. 21, secs. 27 & 50, which prescribes no form of conviction, nor does any other statute give a form to be used in this particular case. The justice was therefore bound to follow such a form as would be sufficient under our statute 2 Wm. IV. ch. 4, which supplies a form to be used in all cases of summary conviction except where a form is specially given for the particular case. Instead of following that general form, the justice has adopted the very short and convenient form given by the Summary Punishment Act, which act has nothing to do with such cases as that he had before him. We have here therefore a conviction which is neither good on the principles of the common law, as laid down in decisions of the courts, nor warranted by any statute; for the conviction does not shew that the evidence was given in the presence of the defendant, nor that the defendant was summoned and did not appear. Such a conviction is clearly bad on the face of it. Then the case is this: the now plaintiff (Moore) was not by law liable to be convicted of any offence; for, living in Canboro', he could not be compelled

to do his statute labor in another township (*a*). On that point we have no doubt. He was nevertheless convicted by an order of the magistrate, and his property sold, when he had committed no offence. He has sued for this injury; and when he is complaining on this substantial ground, and not on account of any mere slip in the proceeding, he has a right to insist that at least a conviction legal on the face of it should be shewn, which here is not the case.

I incline also to think, though it is not necessary to determine that point, that the plaintiff, shewing that he did not reside in Moulton, was entitled, even if the conviction had been regular on the face of it, to insist that he was illegally convicted. There are some modern cases which seem to me to go that length.

On the ground that the defendant did not shew upon the trial a conviction legal on the face of it, we direct the postea to be given to the plaintiff.

Per Cur.—Postea to the plaintiff.

IN RE EXECUTORS OF THE HON. ROBERT DICKSON V. THE M. C. OF THE VILLAGE OF GALT.

Statute labour—Authority of Village Council to impose a tax for.

The municipal council of a village have authority to impose the performance of statute labour, or a tax in lieu thereof, only on those inhabitants who are not otherwise assessed.

(Q. B., T. T., 15 Vic.)

Vankoughnet, Q. C., obtained a rule *nisi* to quash a by-law of the municipal council of the village of Galt, as illegal, or so much of it as relates to persons being made liable to statute labour who are otherwise assessed on the assessment rolls for the said village.

The by-law in question is No. 29, and was passed on the 9th May, 1851. It recites, that by the statute of this Province 13 & 14 Vic., ch. 67, sec. 22, every male inhabitant of any city, incorporated town or village, between the age of 21 and 60, not otherwise assessed, and not exempted from statute labour, shall, instead of such labour, be taxed ten shillings yearly; and that the municipality of any city, town, village or township may by by-law, to operate generally and ratably, reduce, and

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(*a*) The statute (Con. Stats. U. C. c. 55, s. 80) which governs cases like the above provides that no such person (*i. e.* one able to perform statute labour) shall be exempt from the tax by reason of his producing a certificate of his having performed statute labour or paid said tax elsewhere, *unless* he was actually out of the limits at the time he so performed statute labour or paid the tax.

at their discretion, increase the number of days' labour to which any such party on the assessment roll shall be liable.

And it enacts, that every male inhabitant between the age of 21 and 60, not otherwise assessed, and not exempted, &c., shall, instead of statute labour, pay a tax of ten shillings.

And further, that every person assessed on the assessment roll at not more than 3*l.* annual value, shall be assessed at two days' labour; if more than 3*l.* and not over 6*l.*, three days' labour, and so on, giving a graduated scale up to persons assessed at 60*l.* annual value, and providing that for every 12*l.* above 60*l.* one additional day's labour shall be imposed.

And that every person so assessed shall pay, in commutation of statute labour, 1*s.* 3*d.* per day.

Then follows a clause providing for enforcing the payment by distress of the statute labour commutation money, which seems intended to apply to both classes, that is, to those *not otherwise* assessed, and who have ten shillings to pay, and to those who, being otherwise assessed, have also to pay in commutation of statute labour 1*s.* 3*d.* for every day at which they shall be rated, according to the scale given in the by-law.

It was objected that by law it is not competent to the municipal council of any city, town or village to impose statute labour, or any tax in lieu thereof, on persons who are assessed for the general purposes of the village, but only on persons not so assessed.

Irving shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It is clear, we think, that the 22nd clause of 13 & 14 Vic., ch. 67, does not authorise the imposition of statute labour by a by-law to be passed by the municipal council of any city, town or village, except upon inhabitants not otherwise assessed (*a*).

The scale of days' labour imposed by that clause on inhabitants otherwise assessed, is expressly confined to the cases of inhabitants of *any township*. And the proviso towards the end of that clause, under which proviso it is that the council of Galt have assumed to act in passing the by-law now in question, does not in terms or impliedly vary from the former part of the clause in that respect; for it gives to the council of any city, town, village or township, power to make by-laws, to operate generally and ratably, reducing or at their discretion increasing the

(*a*) The present law is in effect the same—(see Cons. Stat., U. C., c. 55, s. 79.) The excepting words in the statute are, "who has not been assessed upon the assessment rolls of the city, town or village, or whose taxes do not amount to two dollars."

number of days' labour to which any such party *rated on the assessment roll or otherwise* is made liable by that act; that is, they may by their by-law increase or reduce the ten shillings by that act, imposed on inhabitants of villages not otherwise assessed, or increase or reduce the number of days fixed by that act for the inhabitants of townships who are *otherwise assessed.*

There is no inconsistency in the clause. We have only to consider the two classes of persons—assessed, and not assessed—and also the different cases of townships and cities, towns and villages, and apply to each what is evidently meant for each; and there is no repugnancy, for there is something on which each of the expressions used can consistently attach.

There is nothing in the 28th division of the 31st clause of 12 Vic., ch 81, even if that clearly applied to villages also, at variance with this construction; for that only gives power to make by-laws for enforcing the performance of statute labour, or payment of commutation, in those cases where the burthen has been legally imposed.

We apprehend the law has been generally taken to be as we state it to be, and that the streets of villages are left to be made and repaired out of the public fund raised by general rate upon the inhabitants, so far at least as the assessed inhabitants are concerned, and that they are not to be subjected to a separate tax for statute labour (*a*).

We therefore make the rule absolute for quashing so much of the by-law as relates to statute labour or payment of any commutation therefor, to be exacted from the inhabitants of the village of Galt who are or may be otherwise assessed in that village.

Per Cur.—Rule absolute, with costs.

METCALFE QUI TAM V. REEVE AND GARDNER.

Justices of the Peace—Conviction—Liability—Pleading.

Justices of the peace before whom a conviction is made, are not *jointly* liable under 4 & 5 Vic., ch. 12, for not returning the same.

A declaration charging that the return was not made to the *next ensuing quarter sessions* of the peace is bad, the statute requiring a return to the next ensuing *general* quarter sessions.

(Q. B., T. T., 15 Vic.)

Qui tam action, under 4 & 5 Vic., ch. 12, against two defendants, Reeve and Gardner, as justices of the peace, for not returning a conviction.

(*b*) The distinction created by the Act as to statute labour in townships and commutation therefor in cities, towns and villages, is most convenient and useful. Great inconvenience would result from having both systems the same.

The declaration, after stating the conviction, alleged that the defendants did not make a return of the said conviction under their hands to the next ensuing *quarter sessions of the peace.*

Special demurrer by the defendant Reeve, assigning several causes, two of which were, that the defendants are not jointly but severally liable, and that it is not alleged that the defendants did not make the return to the next ensuing *general* quarter sessions of the peace.

Adam Wilson, Q.C., for the demurrer. *C. W. Lount*, contra.

ROBINSON, C. J., delivered the judgment of the court.

We think this declaration is bad, for it treats the defendants as being liable jointly in one penalty, whereas it is by the statute made the several duty of each of the justices joining in a conviction to report it to the sessions.

They cannot commit a joint offence, and be subject to one penalty, because neither transmitted it.

And it is not charged that the return was not made to the next "*general* quarter sessions," but only that it was not returned to the next "*quarter sessions,*" which may mean a different court, and one to which there was no necessity to make the return (*a*).

The distinction between courts of quarter sessions and courts of general quarter sessions, is stated by Sergeant Hawkins. We think there are some other of the exceptions which might be found entitled to prevail.

Judgment for the defendant Reeve, on demurrer.

ROSS QUI TAM V. MEYERS.

32 Hen. VIII., ch. 9.—Qui tam action for buying disputed titles.

A testator died, leaving a will, by which he directed that his debts should be paid as soon as practicable after his decease, and gave and bequeathed to his executrix and executors all his real and personal property in trust, to sell, &c., such parcels or tracts of land as might be necessary for carrying his intention into effect. He then gave the residue of his real and personal property to his wife during her life, and after her death to such of his children as might then be living, share and share alike.

About twenty years after his death, his widow (who had married again) and one C. W., for three of the children then living, conveyed one of the lots now in question to one G. R., in fee; and G. R. subsequently conveyed to one P. L., who was in possession when the now defendant took his deed.

(*a*) Statutes imposing penalties are always strictly interpreted. "The inclination of the Court should always be against that construction which imposes a burthen on the subject. The words of a penal statute should be restrained for the benefit of him against whom the penalty is inflicted."—*Broom's Legal Maxims*, p. 489.

About the same time the widow and one of the sons conveyed the other lot now in question to the now plaintiff, who was in possession when the now defendant took his deed for this lot.

About sixteen years after these deeds were made, the defendant took a deed of bargain and sale of both lots from all the surviving children.

Held, that there was nothing to prevent the children from conveying their reversionary interest; and that defendant was not liable, in a *qui tam* action, for purchasing a disputed title, under 32 Hen. VIII., ch. 9.

(Q. B., T. T., 15 Vic.)

This was an action, brought 30th July, 1846, to recover a penalty, on the statute 32 Hen. VIII., ch. 9, for buying a pretended title (*a*).

The plaintiff declared, in the first count, that Angus A. Chisholm, James Chisholm, Duncan McDonell and Mary McDonell his wife, pretending right in and to certain messuages, closes, lands, tenements and hereditaments, with the appurtenances, situate in the township of Huntingdon, being lots 1 in 2nd, and 7 in 1st concession, &c., and not regarding the statute, &c., on the 3rd March, 1846, at, &c., did unlawfully and contrary to the statute, bargain and sell to the defendant the said pretended right of them the said A. C., &c., in and to the said messuages, closes, lands, tenements and hereditaments, with the appurtenances; whereas, in fact, neither the said A. C., J. C., &c., nor any nor either of them, nor any of their ancestors, nor any other person by whom they or either of them claimed the said premises, *had been in possession of the same*, or of the reversion or remainder thereof, nor taken the rents and profits by the space of one year next before the aforesaid bargain made; and whereas in fact the right of the said A. C., J. C., &c., and of each of them, in and to the said messuages, &c., at the time of the said bargain made, was a pretended right, against the aforesaid statute; and the defendant, at the time of the bargain, well knew that the said right of the said A. C., J. C., &c., in and to the said messuages, &c., was a pretended right; and also then well knew that neither the said A. C., J. C., &c., nor either of them, nor any or either of their ancestors, nor any person by whom they or either of them claimed the said premises, had been in possession of the same, *or of the reversion or remainder thereof*, nor taken the rents or profits thereof by the space of one whole year next before the bargain made: yet that the defendant, so knowing the said right of the said A. C. and J. C., &c., to be a pretended right as aforesaid, and that neither (asserting his knowledge that neither) they nor any by whom they claim had been in

(*a*) The statutes relating to Buying of Titles are 3 Edward I., c. 25, 18 Edward I., s. 1, c. 49, and 32 Henry VIII., c. 9. The doctrines of maintenance, champetry, and Buying of Titles are become in a great measure obsolete as matters of criminal law, and very seldom come into notice as affecting the validity of contracts.

possession, &c., as just above named, but not regarding the statute, did then and there, to wit, on, &c., at, &c., contrary to the said statute, buy and take of the said A. C., J. C., &c., the said pretended right of them the said A. C., J. C., &c., in and to the said messuages, &c., so bargained and sold to him the defendant as aforesaid; the said messuages, lands, &c., at the time of the buying such pretended right, &c., being of large value, to wit, 1,800*l.*; by reason whereof an action has accrued, &c., to demand of the defendant the said value of the said messuages, lands and tenements, &c., so by the defendant bought and taken, &c.

In the second count the plaintiff charged that the defendant did unlawfully and contrary to the statute, by means of a certain indenture of bargain and sale, then made by the said A. C., J. C., &c., to the defendant, obtain and get the right of the said A. C., J. C., &c., to certain other messuages, lands, tenements and hereditaments, situate in the township of Huntingdon, being, &c, the said right of the said A. C., J. C., &c., to the last mentioned lands, tenements and hereditaments, *then* being a pretended right. There were precisely the same averments as to no one by whom A. C., J. C., &c., claimed having been in possession of the lands, or of the *reversion* or remainder thereof, for a year next before the said pretended right was obtained; and of the defendant's knowledge of the right being pretended; and that no one claiming, &c., had been in possession of the lands, or of the reversion or remainder thereof, for a year next before, &c.; and as to the *value of the premises so by the defendant obtained and got*, and the liability of the defendant to the penalty.

In a third count the plaintiff charged that the *defendant*, by means *of a certain deed* in writing, made by the said A. C., J. C., &c., did obtain and get the right of the said A. C., J. C., &c., to certain closes, pieces or parcels of land and premises, situate in Huntingdon, being, &c.; the said right being a pretended right; and neither of them, the said A. C., J. C., &c., nor any person through whom they claim, having been in possession of the same (*a*), nor of the reversion nor remainder thereof, for a year next before, &c.; and contained the same averments as the other counts.

The defendant pleaded *nil debit*, and the jury found for defendant.

It was proved that one Alexander Chisholm, being seized of the lands mentioned in the declaration, made his will on the 15th October, 1808, by which he directed "that his debts should be paid as soon as practi-

(*a*) Parties in lawful possession of any lands, &c., or in receipt of the yearly rents and profits, may, by section 4, buy, or get in by any reasonable ways or means, the pretended right or title of any other person.

cable after his decease, and gave and bequeathed to his executrix and executors all his real and personal property, in trust, to sell, alien and convey such parcels or tracts of land as might be necessary for carrying his direction into effect." The residue of his real and personal property "he gave to his wife, Anne Chisholm, during her life; and after her decease to such of his children as might be then living, to be divided share and share alike." And he appointed his wife executrix, and his brother, John Chisholm, and Donald McDonell, Esq., executors of his will. It was admitted that the two last executors named died in 1816.

On the 6th July, 1830, Anne Marsh, the widow of the testator, and who had since his death married one Marsh, and Charles Werden, for Angus A. Chisholm, Charles Chisholm and James Chisholm, in consideration of 80*l.*, conveyed to Gilbert Reid, in fee, lot 1 in 2nd concession, Huntingdon; and on the 28th July, 1832, Reid conveyed the same land by bargain and sale to Philip Luke for £150.

On 12th March, 1830, Anne Marsh and Charles Chisholm conveyed to the plaintiff Ross, by bargain and sale, lot 7 in 1st concession, Huntingdon. Ross entered on this lot, and had ever since been in possession.

Charles Chisholm, one of the sons of the testator, died about the end of 1845.

On 3rd March, 1846, the defendant took a deed of bargain and sale, in fee, of both lots, from *Angus A. Chisholm*, James Chisholm, Duncan McDonell and Mary his wife (formerly Mary Chisholm), being the three surviving children of Alexander Chisholm, the testator.

There was proof that Luke was in possession of the one lot and Ross of the other, at the time the defendant took this deed, and that the defendant knew it. The lands were sworn to be then worth from 1800*l.* to 2000*l.*

The defendant's counsel moved for a nonsuit, on the ground that the declaration was not supported; for that it was not shewn that Mary McDonell had conveyed to any person before the deed to the defendant, in which she joined.

The learned judge ruled, that even if the defendant were aware of the parties being in possession under deeds from Mrs. Marsh, who had a life estate, and from the sons of the testator; yet, if Mary McDonell had an equal interest in the lands with her brothers (which she had not before conveyed), the defendant had a right to purchase that undivided interest in the whole premises, and cannot be charged with buying a pretended right.

The plaintiff declining to accept a nonsuit, a verdict was directed for the defendant.

Vankoughnet, Q. C., shewed cause against a rule *nisi* for a new trial on the law and evidence, and for misdirection. He referred to the will, and contended that the sale to Ross was clearly not made by Anne Marsh, as trustee. The purposes of the trust were satisfied, and she then held under the devise to her for life. Now, though some of the children appeared to have sold by the same deed to Ross, yet one of them, the daughter (who joined in the conveyance to the defendant) did not, therefore the declaration is not supported; and the defendant had a right to buy her reversionary interest. Mr. Chisholm did not take an estate in fee, but only that quantity of interest which the purposes of the trust might require.—Jarman on Wills, vol. 2, ch. 34, Estates of Trustees, pp. 206, 213; *Doe Cadogan* v. *Ewart* (7 Ad. & Ell., 636); *Hawker* v. *Hawker* (3 B. & Al. 537); *Doe Shelley* v. *Edlin* (4 Ad. & Ell., 582); *Doe White* v. *Simpson et al.* (5 East., 162).

Eccles, contra, referred to Sug. V. & P., vol. 2, 10th ed. p. 80; 2 Story's Eq., sec. 1127; *Jinkins* v. *Hilvy* (6 Ves. jr., 646, note *a*); *Balfour* v. *Welland* (16 Vessey, jr., 151); *Jefferson* v. *Morton et al.* (2 Saun., 11 *b*); *Houston et al.* v. *Hughes et al.* (6 B. & C., 421). If the testator's widow had a right, as a trustee, to convey a fee simple, and did so, the remainder limited to the children was destroyed. Then defendant knowing these circumstances, takes a deed from the three surviving children (two of whom had already conveyed) of their reversionary interest. He is therefore liable in this action under the statute.

ROBINSON, C. J., delivered the judgment of the court.

Without entering into the question whether Anne Marsh took necessarily an estate in fee under the will, or only an estate in fee in case it should become necessary to sell for paying debts, or whether she was limited to an estate for life, we are clear that the verdict for the defendant was proper; for Anne Marsh, at any rate, could make a deed which would conclude her and bind her interest during her life, whether there were debts to be paid or not; and the possession of her vendees, while she lived was, in any view, not inconsistent with the title of the testator's children, who could have no estate in possession till after her death. There was nothing to disable them from selling their reversion. They could not be disseised, and were not disseised by the vendees of Anne Marsh entering, and were therefore not disabled from conveying their reversion.

The intention of the statute 32 Hy. VIII., ch. 9, and the ground of the principle of the common law, which is said to be fully in accordance with it, was, that a person claiming a right which he knew to be disputed should not sell a mere law suit, but should first reduce his right

to possession, and then sell. These reversioners could not do that, for they had no present right to the possession.

The deeds made by Anne Marsh in 1830, more than twenty years after the testator's death in 1808, could never be inferred to be for payment of debts; from the circumstance of the children of the testator, or some of them at least, being made parties to those deeds, no one would suppose otherwise than that the parties were affecting to sell their beneficial interest under the will. But then, in one of the deeds of 1830 none of the children were in fact executing parties, and in the other only one of them was. There was nothing therefore to prevent the children, except as applies to one of them, Charles Chisholm, who did execute one of the deeds in 1830, from conveying their reversion to any one who would buy it. Charles Chisholm died in 1845, and this defendant took no conveyance from him, but only from the three others, who had made no other deed, so far as we see in the evidence; Mary Chisholm certainly had not.

The stat. 32 Hy. VIII., ch. 9, forbids any one to buy any pretended right or title (which may include reversionary interests when they are known to be in dispute), except the person who shall sell has been in possession of the same, *or of the reversion or remainder*, or taken the rents or profits for a year; and the buyer, if he knowingly offends against this act, is to forfeit the value of the lands. I have found it difficult, in considering this statute, to satisfy myself as to what is meant by being in possession for a year of the reversion or remainder; of course the words which follow—"*or taken the rents or profits thereof*" —cannot apply to the case of persons holding estates in revision or remainder; and the estate in remainder of the children in this case had been theirs for more than a year, and as much in possession as such an estate can be. But then it is said that they had no such estate, because all went to the widow to pay debts. That does not appear, and it is evident this plaintiff and the other vendee did not think so when they took their deeds.

But surely whether a person is, or is not, to be subject to the penalties of this statute, can never depend on the determination of a nice question upon the construction of a will.

In the case of *Doe dem. Major* v. *Reynolds* (2 U. C. R. 317), we had to consider the question of the application of the statute under circumstances somewhat like the present.

In our opinion the rule should be discharged.

Per Cur.—Rule discharged (*a*).

(*a*) In *Underwood* v. *Lord Courtown*, 2 S. & L., Lord Redesdale said "A per-

DELANY v. MOORE.

Constable—Town and County jurisdiction—Powers.

A constable of any town within the county in which a warrant of attachment is issued under 12 Vic., ch. 60, sec. 1, has authority to execute such warrant.

(Q. B., T. T., 15 Vic.)

Appeal from the county court of the county of Prince Edward.

The defendant in this case, being sued in trespass in the County Court of the county of Prince Edward for taking the plaintiff's goods, justified in a special plea, under a process of attachment from the division court of the second division of the county of Prince Edward, issued under our statute 12 Vic., ch. 69, sec. 1, at his instance, and in his suit, against the now plaintiff. He averred that this plaintiff, after the judgment had been obtained against him, was attempting to remove his goods to another county, and that he, this defendant, sued out a warrant of attachment under the statute, directed to "one Michael McMahon, a constable of the said county of Prince Edward; the said McMahon being styled in the said warrant a constable of the town of Picton"—"the said town being within the county of Prince Edward."

And the defendant averred that McMahon, at the time of the delivery of the writ to him, was a constable of the county of Prince Edward.

The plaintiff replied to this special plea, that the said McMahon "was not at the said time when, &c., a constable of the county of Prince Edward, in manner and form," &c.

The defendant on the trial proved, by the clerk of the corporation of the town of Picton, that McMahon was, on the 17th July, 1850, appointed a constable for the town of Picton by the corporation, and was sworn in on the same day. It was in the same month, and after such appointment, that he executed the warrant of attachment.

The plaintiff's counsel objected that McMahon was not a constable of the county of Prince Edward, and so was not competent to execute the attachment authorised by 12 Vic., ch. 69, sec. 1; because that act provides that the warrant shall be directed to "the bailiff of the division court within which the same was issued, *or to any constable of the district*," and McMahon was not a bailiff of the division court, and was

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son out of possession cannot in law convey anything to a stranger; he can only give a release to one in possession, and the law has wisely provided this in order to quiet possession."

In *Sharp* v. *Carter* 3 P. Wms. 375, and *Hitchen* v. *Lawlor*, Coop. 34, pleas of the Statute 32 Henry VIII. c. 9, were allowed against discoveries which might tend to subject the parties to the penalties thereby imposed.

not a constable of the *district* (as it then was) of Prince Edward, but a constable of the town of Picton in the district of Prince Edward.

The learned judge of the district court overruled the objection; and, the verdict being for the defendant, he afterwards refused to grant a rule *nisi* for a new trial on the same objection. The plaintiff appealed against his judgment refusing the rule.

Read, for the appeal, referred to 33 Geo. III., ch. 2, section 10. *Patterson* contra.

ROBINSON, J. C., delivered the judgment of the court.

We are of opinion that the learned judge decided properly, and that this appeal must be dismissed with costs.

It is true that by the 12 Vic., ch. 59, sec. 1, under which this attachment issued, it must be directed to a bailiff of the division court, *or to any constable of the district*. We must suppose that the Legislature, while passing that act, were aware of the legal nature and tenure of the office of constable in Upper Canada, and of the manner of the appointment; and their enactment must be so construed and applied, if possible, as to be consistent with these, in order that the provision may be carried into effect, and not be inoperative.

The 12 Vic., ch. 81, secs. 67, 71, 74, gives the power of appointing constables for towns to the councils, though not in such clear and precise terms as might have been used for that purpose; and such constables, when appointed, are the proper constables for executing process within such towns.

Counties have now come in the place of districts under the 12 Vic., ch. 78, but there are no such officers as constables for counties under that or any other statute (*a*); nor were there before that act any constables of districts, for the statute 33 Geo. III., ch. 2, sec. 10, upon which the appointment of constables still rests, except so far as provision is made for the office by the municipal act which I have referred to, enacts that the parties "shall appoint a sufficient number of persons in their discretion to serve the office of constable *in each and every parish, township, reputed township, or place.*"

No authority existed under that statute, or now exists, for appoining constables for a district or county generally; and this being so, when the legislature by their act 12 Vic., ch. 69, provide that it shall be lawful for the justice to issue his warrant of attachment directed "*to*

(*a*) The Act in the Con. Stats. Canada, c. 104 (10 & 11 Vic. c. 12), gives power to two or more Justices of the Peace for any Territorial Division (a County or United Counties) to appoint special constables in certain cases.

any constable of the district," we must understand them only to mean to any constable of, or *within the district*, and not to any constable appointed to act *for* the whole district, for there is no such officer.

McMahon, in this case, was a constable of the town of Picton, within the district or county of Prince Edward, and it was within the town of Picton that the goods were to be attached, and were attached.

We are of opinion, that within the words of the plea, and the intention of the statute, he was a constable—not for the county of Prince Edward (for that is not the question), but a constable—that is, one of the constables—of (or within) the county for which the justice making the warrant was competent to act.

Appeal dismissed with costs (*a*).

Brockville School Trustees v. The Town Council.

Mandamus—School Estimate—Trustees in Towns and Townships.

The school trustees of towns, under 13 & 14 Vic., ch. 48, sec. 24, have unlimited discretion as to the number of schools to be kept up, and are not subjected to the restrictions in this respect imposed upon the school trustees for townships.

Where an estimate of the sum required for school purposes for a certain year was sent to the town council by the school trustees, and the council recognized such estimate by paying a portion of the amount, and submitted to the court their reasons for refusing to pay the balance,

Held, that they were precluded from objecting that the estimate was not laid before them *as by law required*.

(Q. B., M. T., 15 Vic.)

Hagarty, Q. C., moved to quash the return to the mandamus issued in this case, the same being insufficient in law, and shewing no cause or answer to the writ, being also uncertain and inconsistent; and that a peremptory writ should go, commanding the defendants to levy the money called for by the requisition of the school trustees of 3rd February, 1851.

The writ was ordered on an affidavit of the secretary of the Board of School Trustees of Brockville, setting forth that on the 3rd February, 1851, an estimate of the amount required for school purposes for the year 1851 was prepared and adopted by the trustees, and notice thereof sent to the clerk of the town council: that the annual value of taxable real and personal property in Brockville, as appears by the assessment rolls for 1851, and as certified by the clerk of the town council, is 16,552*l.* 2*s.* 1½*d.*; and that, by a resolution of the town council, passed

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(*a*) The power of appointing constables in cities and towns is now regulated by the Con. Stats. U. C. c. 54 (the Municipal Act, ss. 391-402).

on the 5th May, 1851, the amount to be levied for school purposes for 1851 is 4*d.* in the pound on such taxable property, which would amount to less than 276*l.*, whereas the amount required by the estimate of the school trustees is 1,205*l.*

And to this affidavit sworn copies of proceedings of the town council were annexed, whereby it appeared that on the 3rd February, 1851, the board deliberated upon the requisition of the school trustees calling for 1,205*l.*, and resolved that 280*l.* should be granted—viz., for school masters' salaries, 200*l.*; rent of school houses, 40*l.*; superintendent's salary, 15*l.*; apparatus, stationery, books, &c., 25*l.*; and that the residue be taken into consideration at a future period: that on the 18th March, 1851, the council resolved that a by-law should be framed appropriating 920*l.* for purchasing land and building a school house, in accordance with a statement furnished by the secretary of the school trustees: that on the 7th April, 1851, it was resolved by the council that the last above resolution be expunged; and at that meeting it was resolved that under the statute 13 & 14 Vic., ch. 48, it is the duty of school trustees, before altering the boundaries of any school section, or uniting two or more into one, to call a public meeting of the freeholders or householders of each of such sections, by notices to be posted in three public places, specifying the object of the meeting; and that no step shall be taken towards altering the boundaries of any school section, nor any application entertained for that purpose, till all parties interested have been duly notified of such intended application; and till an application be made by a majority of the freeholders or householders in each section, sanctioned by a public meeting to be so called (*a*).

The requisition for 1,205*l.* made by the school trustees specified the following items as composing the sum, viz.:

Site of school house	£170
Building school house	750
Plans and specifications	5
School masters' salaries	200
Rent of school houses for 1851	40
Apparatus, stationery, books, &c.	25
Superintendent's salary	15
	£1,205

On these facts being shewn the court directed that a *mandamus nisi* should issue; to which writ a return was made to the effect that the

(*a*) This section is only applicable to Townships. It will be found in the Cons. Stats., U. C., (the School Act) ch. 64 ss. 40, 41.

school trustees did not lay before the council, *as by law required*, a requisition or estimate for 1,205*l.* for school purposes for 1851; though nevertheless the trustees having in fact, though not according to law, required the 1,205*l.* from the council for school purposes for that year, the council did, before the receipt of this *writ*, provide and levy 280*l.*, parcel of the 1,205*l.* (specifying the items which that sum was designed to meet); and that as to 925*l.*, the residue, they admitted that they had refused and did still refuse to provide the same; because they alleged that that sum was by the trustees required in their estimate for the purchase of a site and the erection thereon of a school house for the town of Brockville, in lieu and instead of the said four school houses which were then, and before, and at the time of the requisition, being used as school houses in the four schools sections into which, at the time of the requisition, Brockville was duly divided for 1851: that the trustees had themselves adopted and approved of such division, and had established a school in each section for 1851; and that in the same requisition in which they required the 925*l.* they required also 280*l.* for allowances of salaries, &c., for the said four schools: that the trustees, before making their requisition, resolved, and that they intend to do away with the four school sections and school houses, and the schools therein, and to have instead but one school section, site and school house for the town; and that to purchase the site for, and obtain such school the 925*l.* was required, and for no other purpose: that such substitution of one school for the four, and the requisition for 925*l.* for that object, has always been and is contrary to the wishes and opinions of a majority of the freeholders and house holders of the town; and were not or was not approved of, ordered, voted or desired, at or by any meeting of freeholders or householders of the town of Brockville, or of any of the said school sections, convened according to law by the said Board of School Trustees for that purpose.

Vankoughnet, Q. C., shewed cause. The authorities cited were, *Regina* v. *Kendall*, 12 B. R. 366; *Wright* v. *Fawcett*, 4 Burr. 2041; *Regina* v. *The Tithe Commissioners of England and Wales*, 14 Jur. 290.

ROBINSON, C. J., delivered the judgment of the court.

We think the town council have been wrong in supposing that the fourth division of the 24th clause 13 & 14 Vic., ch. 68, is restrained or affected by the 18th clause (fourth division), for that the latter provision extends only to school trustees for townships. The discretion of school trustees for towns as to the number of schools to be kept up is unlimited under the 24th clause, whether it was so intended or not. We

infer, however, from the act that it was intended, and there are obvious reasons for making the difference which the language of the act does make. The two descriptions of trustees are carefully kept distinct by the act (*a*).

Then the defendants now shew by their return that they have deliberately resolved not to carry out the estimate of the trustees in full, and it is therefore immaterial whether the estimate was first laid before them in due form or not; for they have recognized it, and have acted upon it in part, and have refused to proceed upon the other part, and have submitted to us their reasons for such refusal. These reasons, we are of opinion, are insufficient, and the return will therefore be quashed, and a peremptory mandamus must go to levy the 925*l.*

There is no inconsistency in the trustees having asked for the salaries for the year for the four schools which they intend shall give place to one large school; because they must be supposed to have meant to continue these schools till they should have the one large school ready which they intend to substitute for them otherwise the business of instruction would be interrupted.

Peremptory mandamus awarded.

IN RE COYNE V. THE MUNICIPAL COUNCIL OF DUNWICH.

Quashing By-laws—Repeal by Council—Costs.

When a municipal council, on being served with a rule *nisi*, repealed the by-law complained of, they were still obliged to pay the costs of the application.

(Q. B., M. T., 15 Vic.)

In this case *Jones* obtained a rule *nisi* last term to quash a certain by-law passed by the municipal council of Dunwich, providing for and regulating the fees of township officers.

The rule was served on the town reeve on the 24th September, 1851; and on the 30th September the council passed a by-law repealing the by-law excepted to, and on the same day they served a notice on the applicant that they had done so.

On the return of the rule in this term,

Cooper, for the council, submitted that under these circumstances they should not be made to pay the costs of application.

(*a*) In Townships three trustees are elected for each school section; but in cities and towns two trustees are elected in each ward, and all the trustees for the city or town form one corporation. In villages and towns not divided into wards, six trustees are elected for the whole municipality and form the village school corporation.

ROBINSON, C. J.—The statute 14 & 15 Vic., ch. 109, sec. 35, provides that whenever any by-law shall be quashed, or declared illegal or void, the municipality shall pay all costs and expenses attending the quashing of it (*a*).

We have not literally quashed the by-law in this case, because, yielding to the application, the council at once, on notice of the rule, repealed it: but we have declared it to be illegal, and think we ought equally in that case to award to the applicant the costs to which he was put in obtaining the rule *nisi* and serving it.

The statute, where it applies, leaves no discretion, but declares that costs shall follow.

Costs of the application to be paid by defendants (*b*).

IN RE HILL AND THE MUNICIPAL COUNCIL OF WALSINGHAM.

Quashing By-laws—Irregularity—Jurisdiction of Superior Courts.

The court refused a rule *nisi* to quash by-laws of a township council, on the ground that, having passed a by-law to contract a loan, they had exceeded their powers in afterwards modifying the said laws; it appearing that such alterations could not affect the security of creditors.

Or, on the ground that the said laws were passed at a special meeting called by a member of the council, and not by the town reeve or other authorised officer.

And semble, with respect to the last objection—that it is doubtful whether the court has authority under 12 Vic., ch. 81, sec. 155, to quash a by-law for an irregularity in the manner of its being passed, though they might hold it void if relied upon in support of something done under it; and that if they should entertain a motion to quash any by-law on account of an irregularity in passing it, it would rather be under the principles of the common law.

(Q. B., M. T., 15 Vic.)

Read moved to quash a by-law passed on the 30th September, 1851, by the Township Council of Walsingham, for amending and repealing a by-law passed on the 26th June, 1851, entitled "A by-law to authorise the Town Reeve of the Township of Walsingham to raise a certain sum money by debentures"—except such parts thereof as relate to the rate of assessment, and the special purpose for which the meeting of the council held on the 30th September, 1851, was called; on the

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(*a*) By the present statute c. 54, s. 195, the Superior Courts may, "*according to the result of the application*, award costs for or against the corporation."

(*b*) This rule has been followed in several later cases.

ground that in passing such parts of the by-law as do not relate to the object for which the meeting was called the council exceeded their powers; and because the repeal of the portions of the by-law of the 26th June, 1851, relating to the loan upon debenture, was contrary to the 177th and 178th clauses of 12 Vic., ch. 81.

And that a by-law passed on the 3rd July, 1851, should also be quashed, having been passed at a special meeting called by a councillor, and not by the reeve, as the law requires.

ROBINSON, C. J.—We have examined these by-laws and do not find that there is anything in the provisions of the by-law of September 30th, 1851, opposed to 12 Vic., ch. 81, or that we can determine to be illegal. The council have been careful to do nothing that could impair the security of any person who had purchased debentures issued under the former by-law; they sustain those fully; and we cannot doubt that they have power to modify the measure which they had passed, in regard to the method of issuing and disposing of debentures to be thereafter issued, and the accounting for the proceeds.

The motion seems to have been made under an erroneous impression in the applicant, that when once the council had determined to contract a loan, in order to aid in advancing a public work, or for any purpose, the whole matter of the by-law passed for that object must be entirely out of their control, and not merely such parts of it as are necessary for securing those who may have advanced money under its provisions.

But the 177th and 178th sections of 12 Vic., ch. 81, have not that effect; and it would be most imprudent in the legislature to have placed the councils under such restrictions, for then they would have no power to recall or alter anything that they might have done irregularly or unwisely, but must let the first measure go into effect with all its imperfections, and the council would be unable to guard against the consequences of any fraud or mal-practice which they might have cause to apprehend.

The objection against the by-laws of July and September, that the one was passed by a meeting specially called by a member of the council, and not by the town reeve, or other authorised officer of the corporation (*a*), and that the other embraces objects different from those for which the special meeting was called at which it was passed, is one which we do not feel ourselves clearly at liberty to entertain, under the

(*a*) Special meetings of municipal councils may be called by the head of the corporation at any time; but it is his duty to summon a special meeting when ever requested in writing by a majority of the council.—See Consol. Stat. U. C., ch. 54, sec. 143, p. 555.

authority delegated to us by the 155th clause of 12 Vic., ch. 81, which seems to contemplate only the giving power to pronounce upon the legality or illegality of a by-law on a view of its contents.

Whether we ought not merely to hold a by-law void when brought before us in support of any act done under it, by reason of its having been in some measure irregularly passed; but also to entertain a motion on such a ground for setting it aside, is a question of much importance. If we should feel it incumbent upon us in any case so to interfere, it would not be, we apprehend, under the clause of the statute referred to, but on the general principle of the common law, that it is necessary to the validity of a by-law that the mode of passing it prescribed by its charter should be strictly pursued, and that in the absence of any express provision on the subject, it should appear to have been passed in such a manner as by the common law would be essential to its validity.

In looking over the papers placed before us in this case, and on examining the statute, we see no sufficient ground for calling these by-laws in question.

Per Cur.—Rule refused.

Doe dem. Morgan et al. v. Boyer.

Building Society mortgage—Ejectment—Money paid voluntary—Pleading.

Under 12 Vic., ch. 90, sec. 12, the president and treasurer suing on behalf of a building society, must be the president and treasurer for such society at the time of commencing the action.

After trial of an ejectment brought upon a mortgage, at which leave was reserved to move for a non-suit, the suit was settled and the costs paid by a third party, interested as an after mortgagee of the same property. The costs were paid without the defendant's authority.

Held, that this payment could not affect the defendant's right to recover costs from the plaintiffs in case a non-suit should be ordered; and consequently, the defendant having moved for a non-suit, that it was still necessary to determine the point reserved at the trial.

The fact of a payment having been made under protest, but without duress or assent on the part of the payee to any reservation of his right, would form no ground for an action to recover back the money.

(Q. B., M. T., 15 Vic.)

The declaration was on a demise for seven years, stated to have been made on the 1st of August, 1851, by Morgan, president of the Newcastle District Building Society, and Beatty, treasurer of the said society.

The defendant on the 4th June, 1849, executed a mortgage of the premises in question to the lessors of the plaintiff, who at that time respectively held the offices of president and treasurer of the Newcastle

District Building Society. The mortgage was to secure 300*l.* advanced to the defendant from the funds of the society, with a proviso that it should be void if the defendant should pay regularly the monthly instalments on his shares, with interest on the money advanced.

He made his monthly payments up to 1st of January, 1850, but none afterwards; and this ejectment was in consequence brought on the part of the society.

The defence set up was, that when this action was brought (some time in August, 1851) the lessor of the plaintiff (Morgan) was not president of the society, but Mr. ——— who had held the office since the 1st August, 1851, Mr. Perry having been the president from 1st June, 1850, to that day.

It was objected by the defendant, that the demise being joint the plaintiff could not recover, as one of the lessors of the plaintiff had no legal interest or right in the mortgage, either at the time of the demise stated, or of bringing the action:—that the action should have been brought in the name of the actual president and treasurer for the time being.

The point was reserved, and a verdict in the meantime was taken for the plaintiffs.

Another action of ejectment was brought in the name of the same plaintiffs as president and treasurer, against the same defendant, on a mortgage of other premises given on the 28th November, 1848, to secure 100*l.*, with the same proviso as the other mortgage. The same objection was made, and the point reserved and a verdict taken for the plaintiff.

Read, for the defendant, moved in each case for a non-suit on the leave reserved. He referred to 9 Vic., ch. 90, sec. 12.

At the return of the rule *nisi* the plaintiffs produced an affidavit of the plaintiffs' attorney made in each case—that since the trial one Austin, to whom the defendant had made a second mortgage on the same property, had paid up the mortgage to the society in full, and taken a discharge of the mortgage from the lessors of the plaintiff; and had also paid the costs, subject, however, to taxation by the master.

On the part of the defendants affidavits had since been filed, stating —that Austin, having a mortgage on the premises in question in each suit, observing a printed notice published some days after the trial, that the Building Society would, on the 8th of November following, sell the property by public auction under a power given in the mortgages which they held, he (Austin) went with his attorney to the office of the society, and it was agreed that he should purchase from the society the two

mortgages by private sale, the mortgages which they had taken admitting of their so disposing of them: that he consented to pay also the expense of advertising and the charge of their solicitor for preparing the necessary papers: that nothing was said at that time about the costs of these actions: that the sale was postponed on the 8th November; and a few days afterwards, he (Austin) and his attorney called again to arrange the matter, and to receive, as they expected, an assignment of the mortgages on paying the debts and other charges just mentioned, when the plaintiff's attorney first informed them that the costs of these actions, amounting to about 36*l.*, must also be paid before the society would give up their mortgages: that they remonstrated against this as an unexpected demand, which they had no authority from Boyer to accede to, and which was not included in their previous agreement: that the plaintiffs' solicitor insisted that the costs must be paid or he would sell the property the next day: that they requested him to wait the issue of the motion for non-suit, pledging themselves to pay the costs if the non-suit should not be ordered: that the solicitor persisted that he would sell if the costs were not at once paid to him: that Austin thereupon, to avoid the sale, paid the costs with other money, protesting that the plaintiffs were not entitled to it, and that he was advised he could recover it back: "that the solicitor took the money notwithstanding the protest, and did not offer to return the same, or to annul the arrangement, unless they would pay the costs without protest."

M. C. Cameron shewed cause, and cited *Doe dem. Morgan* v. *Black*, 2 Camp. 447.

ROBINSON, C. J., delivered the judgment of the court.

The mere saying by a party making a payment that he pays it under protest, when there is no duress, or compulsion upon him to pay, when the other party insists upon the claim as a right and gives no assent to any reservation of his right by the person paying: this, we think, does not leave it in the power of the party paying to sue for the money back, merely because he said that he paid it under protest (*a*). But here, if by the event of the suit the defendant would be entitled to costs against the plaintiff, it could not be in the power of Austin, a third party, to compromise that right by paying the debt and the plaintiff's costs in order to answer any object of his own.

We therefore think that no acquiescence in the verdict on the part of this defendant can be inferred from what passed between Austin and

(*a*) See also on this point the cases of *Baldwin* v. *Johnson*, *ante* p. 24, and *Grantham* v. *City of Toronto*, *ante* p. 48.

the plaintiffs, so as to relieve the court from the necessity of determining the point reserved.

And, as to the point reserved at the trial, we think that the 9 Vic. ch. 90, sec. 12, clearly requires that this action should have been brought in the names of those who were president and treasurer at the time of commencing it, and that a non-suit should therefore be entered.

Per Cur.—Judgment of non-suit.

DOE DEM. SHERWOOD ET AL v. MATTHESON.

Sale for taxes—Sheriff's deed—Payment to Sheriff or Treasurer.

Ejectment: The defendant proved that on the 19th of June, 1839, he bought the land in dispute at sheriff's sale, and on the 19th of August, 1842, received the sheriff's deed. The plaintiff produced the sheriff's receipt, dated 14th July, 1836, for all arrears of taxes due up to the 1st July, 1835. When this payment was made to the sheriff he held in his hands a warrant to levy the amount due for taxes on the land. The lot was duly advertised by him on the 4th June, 1840, pursuant to the stat. 8 Vic., ch. 46.

Held, that as the payment was made to the sheriff, and not to the treasurer, the stat. 3 Vic., ch. 46, was not applicable; and that the plaintiff, having shewn an otherwise good title, was entitled to recover.

(Q. B., M. T., 15 Vic.)

Ejectment for part of lot 6 in the 1st concession of Osgoode.

The title of the plaintiff was undisputed at the trial on any other ground than this, that the defendant claimed to be the owner as purchaser at a sheriff's sale for taxes, the validity of which sale the plaintiff disputed, on the ground that the taxes were not in arrear, but had been paid before the sale; and the question for consideration in the case was, whether the taxes were in fact so paid as to acquit the land, and to render the subsequent sale illegal.

The sheriff of Ottawa, under a writ authorising him to sell for taxes, sold the land in question by public auction on the 19th of June, 1839, to the defendant, for 2*l.* 13*s.* 5½*d.*, for eight years' taxes then in arrear; and on the 19th of August, 1842, he made a deed to the defendant in pursuance of the sale.

But on the 4th of July, 1836, the then proprietor of the land had paid to the sheriff the sum of 3*l.* 13*s.* 1½*d.*, being the arrears of taxes due up to the 1st of July, 1835, and took his receipt, which was produced on the trial; and it was proved that when this payment was made to the sheriff he held in his hands a warrant to levy the amount due on this and other lands in his district.

The lot was duly advertised by the sheriff by notice, dated the 4th of June, 1840, pursuant to the statute 3 Vic., ch. 46, on the 4th

section of which act the defendant relied for upholding his title, notwithstanding the payment made to the sheriff.

The learned judge held the plaintiff entitled to recover, for that the payment to the sheriff, while he held the writ commanding him to levy the money, was a good payment; and, the statute 3 Vic., ch. 46, not applying to the case, the land was acquitted, and the sale consequently illegal.

No evidence was given at the trial to account for the lapse of time between the expiration of the eight years, viz., 1st July, 1835, and the sale; nor for that between the sale in 1839 and the sheriff's deed in 1842; nor was it shewn how it happened that the land was sold, notwithstanding the payment made to the sheriff, and that the proprietor, throughout the whole period that elapsed before the conveyance, had made no claim to have the payment credited or to redeem the land.

The jury, under the direction of the learned judge (Draper, J.), gave their verdict for the plaintiff, leave being reserved to the defendant to move for a nonsuit.

The stat. 7 Wm. IV., ch. 19, provides that all sales of lands for taxes shall take place in the district town, on the second day of the court of quarter sessions, at or near the court house, and shall be advertised accordingly; that the land shall be put up at 2*s*. 6*d*. per acre; if no bidder at that price, then to be sold according to the previously existing law, at the next general quarter sessions which shall occur after the expiration of the six months' notice required by law. The last clause enables the sheriff to put up and adjudge to the purchaser such part of the lot as he may think best for the interest of the proprietor. This act was passed on 4th March, 1837.

By 1 Vic., ch. 20, no sales for taxes of lands were to be made in the year 1838; after that year the same proceedings were to be taken which by law should be pursued before any lands shall be sold: Passed 6th March, 1838.

The 3rd Vic., ch. 46 (passed 10th February, 1840), recites that doubts have arisen on the construction of the two foregoing acts: that under colour of them certain lands in the district of Ottawa, and which before the passing of 7 Wm. IV., ch. 19, were in arrears for taxes eight years and more, were sold by the sheriff to satisfy such arrears, although the period for which such sale was advertised commenced before the passing of 1st Vic., ch. 20; and makes valid the sales of lands in the district of Ottawa, effected in June, 1839, as if 7 Wm. IV., ch. 19, had never been passed; provided that the sheriff do

immediately publish a list of all the lands sold by him as aforesaid, by advertising in certain papers named; and the sheriff may within two years from the date of those advertisements convey the lands so sold; *provided that this shall not make valid any sale for taxes where such lands were not liable to the rates and assessments*, or to be returned by the treasurer as in arrear.

The second section recites, that in January, 1834, the greater part of the books, &c., of the treasurer of the district of Ottawa, were destroyed by an accidental fire; and there is cause to apprehend that the lists which have been since made out of lands in arrear for taxes have comprised some lands on which the taxes have been paid, but of which payment no record remained in the treasurer's office; and enacts —that the sheriff shall immediately publish a list of all the lands which have been sold for taxes since 1st January, 1834. *Section 3rd* requires the sheriff to publish with such list a notice, requiring persons who had paid taxes on any of the lands in the list *prior to 1st May*, 1835, to produce to the treasurer, within three years from the publication of such list, any receipt signed by the treasurer, or an affidavit in proof of such payment which had not been credited. *By section 4th*—If the owners of such land neglect within that period to produce to the treasurer "due proof of the payment of the taxes in the manner hereinbefore directed," the sales effected by the sheriff are declared valid.

Adam Wilson, Q. C., obtained a rule *nisi* to enter a non-suit on the leave reserved, or for a new trial on the law and evidence. *Cameron, Q. C.*, shewed cause.

ROBINSON, C. J.—Our opinion is in favour of the plaintiff. The land here was properly returned as being in arrear, and it is not denied that the writ to sell properly issued to the sheriff. There was no mistake on the part of the treasurer in returning the land as being liable to sale, when in fact it was not, on which ground the validity of the sale made in consequence has been in other cases questioned in this court.

But the complaint is, that while the sheriff held the writ commanding him to make the money, he was paid the whole amount due and gave his receipt, and yet went on and sold the land; owing probably to the circumstance of the writ being a general one, embracing all the lands in arrear in his district, and of his inadvertently omitting to check the sale of this lot after he had been paid.

If there had been distress on the land, the sheriff, from the very words of the statute, and of the writ, could not have made a legal sale;

and it would be inconsistent to hold that he could make a legal sale after the owner of the land had actually paid him what he was commanded by the writ to levy.

Of the sheriff's right to receive the money, and that payment to him would discharge the writ, there can be no doubt (*Taylor* v. *Bacon*, 2 Lev. 203; Bac. Abr. Execution D). And it would be hard if anything in the 3 Vic., ch. 46, should expose the proprietor, under such circumstances, to the loss of his land; because it is very clear that that statute was not passed with any such view, but only for the purpose of pretecting owners of lands who had paid their taxes to treasurer against the danger of injury from the loss of the treasurer's books.

The loss of the treasurer's books could have nothing to do with this case, where it was the sheriff, and not the treasurer, who had received the money. And if the owner here should lose his land from not attending to the notice published under 3 Vic., ch. 46, that would be a consequence which could never have been intended by the legislature, because he was not relying on any payment to the treasurer, whose books were burnt, but on a payment made to the very officer who afterwards sold the lands as if he had not paid the money. Nevertheless if the legislature had incautiously framed their act in such terms as would make it apply to this case, there might be found no remedy except in an action by the owner of the land against the sheriff. But it is clear that for the reason pointed out in the statute 3 Vic., ch. 46, has no application here; and that the plaintiffs stand on no other ground than that on which any party would at any time have stood whose land in any district had been sold by the sheriff, after the taxes had been paid to him in discharge of the writ then in his hands. The 3rd and 4th clauses of the act in clear terms apply to those cases only in which rates were paid *before* 1*st May*, 1835, and paid to the treasurer—for that, we think, is what the act clearly intends; but here the owner of this land paid the taxes *after* 1st May, 1835—viz., on the 14th July, 1836; and not to the treasurer, but to the sheriff. The act therefore has nothing to do with this case, and it would not be reasonable that it should have.

DRAPER, J.—The facts of the case do not appear to bring it within the statute.

The taxes were unpaid after the 1st of May, 1835, and the warrant for the sale of lands was in the sheriff's hands to sell this, among other lots, for arrears. While he held this warrant, on the 14th July, 1836, the owner of this land, in order to prevent its being sold, went to the sheriff and paid him the money, which the sheriff was authorised to levy, either by distress, if there were any distress on the lands,—other-

wise, by sale of as much of the land as was necessary to raise such sum; and on that day the sheriff gave a receipt for 3*l.* 13*s.* 1½*d.*, in full for taxes due upon this land up to 1st July, 1835. Notwithstanding he had thus made all the money he was authorised to make by the warrant, he sold the land for the very money that had been paid to him, or for some part of it; the sum paid to him by the purchaser being stated in the deed to be 2*l.* 13*s.* 5½*d.* He had no more authority to sell the land, than he would have had if there had been an abundantly sufficient distress upon it during all the time the warrant was in his hands.

Per Cur.—Rule discharged.

KENNEDY v. THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF SANDWICH.

School Trustees—Municipal Councils—Rate for school house—Mandamus.

K. was employed in 1848 by the trustees of school section No. 4 in the township of Sandwich, acting under a by-law of the District Council, to furnish materials for and to erect a school house in that section. Part of the money was paid to him on account, and for the balance he brought an action against the trustees, and recovered judgment. Finding no property of theirs on which to levy, he applied in 1850 to the Municipal Council of the Township, who passed a by-law imposing a rate to satisfy his judgment: this by-law was afterwards repealed before the money had been collected.

It appeared that under the original by-law of the District Council, the rate for erecting the school house had been levied, and the part not paid over to K. had been handed to the secretary-treasurer of the trustees, who absconded: and that K. was in possession of the school house, and retained it for the money due him.

Under these circumstances *the Court held* that the Township Council were not liable, and discharged a rule for a mandamus to them to pass a by-law for raising money to satisfy the claim.

Semble also, that if the applicant were entitled to recover, an action would lie against the council, and therefore no mandamus should go.

(Q. B., M. T., 15 Vic.)

In Easter term last *Adam Wilson, Q. C.*, obtained a rule to shew cause why a mandamus should not issue commanding the Township Council of Sandwich to raise 60*l.*, to be paid to Kennedy in discharge of a claim of his against the school trustees of school section No. 4, in the township of Sandwich, for building a school house in said section, (for which sum the said Kennedy had obtained a judgment against the school trustees in this court) according to a by-law of the said council made on the 16th February, 1850:

Or why the council should not pass a by-law for raising a sufficient sum to pay Kennedy 60*l.*, with interest from the 11th February, 1850, in payment of his claim and judgment:

And why the said council should not repeal or declare void their by-law passed on the 10th December, 1850, for repealing their by-law passed on the 16th February, 1850.

From the affidavits filed in support of the application it appeared that in September, 1848, Kennedy was employed by the Board of Trustees for school section No. 4, in the township of Sandwich, acting under 9 Vic., ch. 20, and under a by-law of the then District Council of the Western District, to furnish materials for and to erect a school house in the said school division, for which he was to receive 96*l.* 15*s.*

That he finished the building, having received during the progress of the work about 50*l.* on account:

That in February, 1849, he brought an action against the trustees for the balance, and obtained a verdict, on which judgment was entered for 62*l.* 8*s.* 2*d.*, damages and costs.

That there being no property of the Board of Trustees on which he could levy, he applied in February, 1850, to the Municipal Council of the township of Sandwich, who, in compliance with his application, passed a by-law in that month imposing a rate on the inhabitants of section No. 4, to raise money for the purpose of satisfying his judgment.

That in December, 1850, another by-law was passed, reciting that the council had been applied to by petition, signed by a large majority of the resident rate-payers in the school section No. 4, to repeal the by-law last mentioned; and it enacted that the said by-law should be repealed, and that any money that had been levied under it should be refunded.

In answer to the application it was sworn:

That the by-law of the District Council of the Western District, under which this matter was begun, was passed on the 11th February, 1847. It authorized 100*l.* to be raised by rate in school section No. 4, to be paid over to the secretary-treasurer, or one of the trustees of the said section, for the purpose of providing a school house therein; and the trustees of that school section were to be held responsible for the proper application of the money.

That the rate under the above by-law was levied in 1848, and that the school trustees appointed for that year for section No. 4, after contracting with Kennedy, and having paid him 50*l.* on account, handed over 50*l.* to one Frederic Clark, one of their number, and their secretary and treasurer, for the purpose of paying the residue of Kennedy's claim: and that Clark absconded without paying the money.

That in 1850 it was determined to give up the school house to Kennedy for the balance due him; and he offered to accept it if the

trustees would pay the costs of his action, which they declined: but that he locked up the house, took away the key, and had held possession ever since; and that he had issued no execution on his judgment, nor taken any steps to enforce it.

The non-payment of the balance due to Kennedy was occasioned, it appeared, by an irregularity, in allowing the money to pass into the hands of a school trustee, instead of the treasurer retaining it until he could legally pay it to the contractor *on the order of the trustees.*

Vankoughnet, Q. C., shewed cause.

The statutes referred to appear in the judgment of the court.

The authorities cited were, *Regina* v. *The Victoria Park Company*, 1 Q. B. R. 288; *Regina* v. *The Hull and Selby Railway Company*, 6 Q. B. R. 70.

ROBINSON, C. J., delivered the judgment of the court.

There are several reasons which, in our opinion, must prevent our making absolute the rule *nisi* for a mandamus.

The applicant Kennedy has taken a remedy by action against the trustees, and has judgment in his favour; and the case of *Regina* v. *The Victoria Park Company* is a strong authority to shew that we could not direct a mandamus to go, ordering the payment to be made, merely because the execution may produce no fruits, in consequence of there being no corporation property seizable (*a*).

But it is even a stronger objection that Kennedy, who is asking us to give him the benefit of this prerogative writ, has actually obtained and still holds possession of the school house, as a means of enforcing payment of his demand for building it.

Besides this, when we look at the merits of the application, we see that it was the District Council that contracted this debt; and, under the 10th and 11th clauses of the 9th Vic., ch. 20, they took the proper measures for paying it, by causing the amount to be actually levied upon the inhabitants of the township, who have thus, under the compulsion of law, paid the amount over. We are asked to compel the present township municipality to pass a by-law for levying the same amount a second time upon the inhabitants, or rather a large portion of it, which it seems was paid by the district treasurer into the hands of the school trustees, or of one of them, who, instead of paying it to Kennedy as he should have done, has absconded with it (*b*). We cannot

(*a*) Under the Common Law Procedure Act, a plaintiff may now have a *mandamus* to enable him to realize his judgment.

(*b*) By the act it was the duty of the District Treasurer to pay over the money to the Secretary-Treasurer of the corporation; and for his wrongful payment, an action might lie against him.

with any propriety do this: for the money, so far as the inhabitants of the township are concerned, went into the proper hands when the District Council or their treasurer received it; and they have paid the demand once and are acquitted. We might as well authorize a second levy on a debtor's goods because the sheriff improperly or by mistake paid the money made on the first levy to the wrong person.

And if, notwithstanding what has been done, it would be right to hold that the township of Sandwich still owes the balance to Kennedy, either as a debt of their own, or because that township is the locality in respect of which the District Council had contracted the debt, then we do not see why the 12 Vic., ch. 81, sec. 175, would not give an action against the Township Council to recover it; and if so, no mandamus should go (*Regina* v. *The Hull and Selby Railway Company*, 6 Q. B. R. 70).

The third subdivision of the 30th sec. of 12 Vic., ch. 83, does not extend, we think, to this case; so that the Township Council could, under its authority, levy a rate to pay for a school house that had been built for the District Council under the former law: and if it could be so applied, then it would follow that the rate could not be levied but at the request of a majority of the landholders and householders of the section: but in this case the majority are opposing it. We see nothing, indeed, in the new school law that favours this application.

The 38th clause seems also to be prospective, having no relation to debts contracted under the old law.

The 31st clause, part 3, of 12 Vic., ch. 81, seems to be wholly prospective, and to give authority only to the township councils to pay for school houses to be built thereafter.

It is not material to the decision of this case that we should ascertain whether the paying the money to the trustee who misapplied it was a payment sanctioned by law, or made against law. Under the 9 Vic., ch. 20, sec. 27, it would properly go into the hands of the trustee who was allowed by his fellows to act as secretary-treasurer; though there are other clauses of the act, as the 8th and 12th, that seem to shew a contrary intention. It is no wonder that the District Council or their treasurer fell into an error in regard to the person who was to receive the money. Though great care has evidently been used to preserve arrangement and consistency in the several statutes which concern this matter, yet we have found it not easy, in the multiplicity of clauses, to determine what the intention was in this respect; and we must consider, that whether a payment made in 1848 was properly made or not, must depend on the school law then in force. It is needless, however, to

pursue that question further; because, for reasons which we have given, and which are independent of that point in the case, we consider that we cannot properly grant the writ (*a*).

On the part of the defendants we have been asked that the rule should be discharged with costs. It is not a case under 9 Anne, ch. 20, nor under 12 Geo. III., ch. 21. At common law, when a rule *nisi* for a mandamus has been discharged, the courts have given costs or not to the person opposing it, according to their discretion in each case. A discretion is now expressly given to the court by 14 & 15 Vic., ch. 109, sec. 85, to award costs to either party in such case.

Here the applicant has taken his remedy by action and obtained a judgment; and has also, as it seems, possession of the house for building which he brings his action: but, on the other hand, he may have obtained no actual redress by either means; and on the whole view of the case we do not give costs to the defendants.

Rule discharged without costs.

McMURRICH V. BOND HEAD HARBOUR COMPANY.

Harbour Company—Transfer of stock—Refusal of Secretary—Right of action.

In an action against a harbour company for refusing to register a transfer of stock by one S. to the plaintiffs,

Held, that although S., being president of the company might perhaps have registered the assignment himself, yet that the refusal of the secretary to do so formed a good ground for an action against the company.

Held also, that the company had no legal lien on the stock for harbour tolls due by S. to them, and could not, therefore, on that ground refuse to register the assignment.

Held also, that registration in the books of the company was necessary in order to complete the transfer.

Held also, as to four shares of which there appeared only an entry of credit to S. in a ledger, but which were not standing in his name in the stock book, that the plaintiffs were entitled to recover in respect of such shares.

Held also, as to the shares for which the plaintiffs were entitled to recover, that they were strictly entitled only to their value at the time of demand and refusal to transfer; but the jury having allowed a larger sum, and this question not having been pressed on the argument, the court did not reduce the verdict.

(Q. B., M. T., 15 Vic.)

The plaintiffs declared, that on the 16th of September, 1850, one Short was possessed of divers—to wit, fifty—shares of stock in the

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(*a*) In *Regina* v. *School Trustees of Tyendinaga*, 20 U. C. Q. B. 528, the Court of Queen's Bench, on the application of one Waterhouse, the contractor for building the defendant's school house, granted a mandamus against the Trustees, commanding them to levy and collect the amount of the judgment obtained by him against them for building the school house.

Bond Head Harbour Company, standing in the books of the company in the name of Short, and transferable according to the act of incorporation: that the defendants are required by the act to register all transfers duly made: that Short's shares were paid up, and no transfer made to any other person than the plaintiffs: that Short by deed transferred his shares to the plaintiffs in trust to sell them, and to pay a debt due to the plaintiffs and other debts due by him, Short, and one Dickson, his partner: and offered to the defendants to sign any proper transfer in their books: that the defendants had notice of this assignment, and were requested to enter and register the same in their books, but refused to do so, whereby the plaintiffs have lost all the benefit of the assignment,—to their damage of 250*l.*

The defendants pleaded, 1st—Not guilty.

2ndly—That Short was not possessed of the said fifty shares.

3rdly—That the defendants had not due notice of the transfer.

4thly—That the defendants were not requested to register the transfer.

The jury gave a verdict for the plaintiffs on the first count for 111*l.* 18*s.* 9*d.*; and for the plaintiffs 25*l.* on a second count, for another cause of action in trover, about which no question arose.

The proof was that Short had originally subscribed for four shares of 6*l.* 5*s.* each, and paid them up in full; and that seven shares were afterwards transferred to him by a third party in the company's books: that no scrip had issued: that Short and the plaintiff McMurrich came together to the secretary of the company, of which Short himself was then president, and desired him to transfer Short's stock to the plaintiffs, by registering in the books an assignment which Short had made to them. They produced the transfer, which the secretary would not read, for he refused to register any transfer from Short, giving as his reason that Short being indebted to the company for harbor tolls as a merchant, the directors had, at a special meeting duly called, resolved that his stock should be retained, and not allowed to be transferred.

It was objected that no breach of duty by the company was proved; that Short being president could, if he had chosen, have registered the assignment himself, and the secretary could not have prevented him, wherefore the secretary's declining to do it could not subject the company to an action.

2ndly—That the paper not being opened and read, or shewn to the secretary, the company had in fact no notice of the transfer.

3rdly—That it is not indispensable that the transfer should be registered in the books, in order to give the transferee a title.

These exceptions were over-ruled, reserving leave to move for a non-suit; and the jury were told that in the learned judge's opinion the plaintiffs had a right to recover; that as to the damages, he thought they should receive as much as would buy fifteen shares as they then stood, with dividends added to them.

Of the fifteen shares, four were explained to be not shares standing in Short's name in the stock book, but merely entered to his credit in a ledger in 1843; it was objected that at any rate there could be no recovery on account of those shares, as they were not standing in the stock book in Short's name. The verdict allowed damages in respect to *all*.

Vankoughnet, Q. C., obtained a rule *nisi* for a non-suit, or for a new trial on the law and evidence, and for excessive damages.

Cameron, Q. C., shewed cause.

ROBINSON, C. J.—We cannot, on consideration of this case, see any reason why the plaintiffs should not recover.

In taking the transfer, it is true they acted for others as well as themselves, but it appears that their own debts exceeded 2,000*l.*; and at any rate they would have a right to recover, and would hold the amount of damages on the same trust as they would have held the shares. We think the plaintiffs were entitled by the evidence to recover on all the issues, and that the exceptions taken at *Nisi Prius* were rightly over-ruled.

The case of *The King* v. *Bank of England*, Dougl. 524, shews that, in the opinion of the court, an undue refusal to register a transfer of shares, or to do whatever may be necessary for perfecting the assignment, will furnish a good ground for an action on the case; and many actions have been sustained in American courts on the authority of that decision (Angel on Corporations, 385; Sedgwick on Damages, 883.)

The company, in the case before us, had no legal lien on the stock standing in Short's name in their books, and could not therefore deny his right to transfer it. The sixth clause of the statute 1 Vic., ch. 31, which constitutes their charter, gives them ample power to enforce immediate payment of tolls by seizing and detaining the vessels and cargoes on which such tolls are chargeable; and they were in error in supposing that they could also lay their hands on the stock of the person indebted to them. Short then, for all that appears, had made a *bona fide* transfer for a good consideration to these plaintiffs, which the statute required to be registered in order to make it effectual, and it was the duty of the secretary having charge of the books to register it. Without registration in the books we take it to be an incomplete trans-

fer, for the act requires the registration; and without it the company would never know to whom they could safely pay the dividends, nor whom they could treat for any purpose as representing the stock (*a*).

It is of no consequence that the secretary did not choose to read or look at the transfer which was shewn to him. It was enough that he was told of the assignment, and that it was offered to be shewn to him.

Nor is it any objection to the plaintiffs' right to recover, that Short, being president, might perhaps in that capacity without impropriety have registered the assignment himself. It was more delicate that he should not go out of the common way to act upon his own assignment, and thus mix up his public and private relations to the company. The 10th clause of the statute says merely that the transfer shall be registered in a book to be kept for that purpose by the company, and gives no particular direction who is to do it. We take it, in the absence of any evidence to the contrary, that the secretary was the proper person to do it; and if so his refusal bound the company, and in this case he was acting in obedience to their special order.

We are of opinion, however, that the plaintiffs can recover only in respect of eleven shares; for as to the four shares stated to be no otherwise standing in Short's name than that there is in a ledger, not in the stock book, an entry of credit to Short of four shares of stock, which were neither subscribed for by him, nor assigned to him by any registered assignment, nor standing in his name in the stock book, we think we cannot recognize the existence of any such shares.

In regard to the eleven shares standing in his name, the plaintiffs were entitled, as we think, to recover their value at the time of the demand and refusal to transfer, and were not strictly entitled to anything more. But the case was argued as if the only question intended to be submitted to us was, whether the present verdict should or should not be reduced to nominal damages; and, looking on the case with that view, we discharge the rule.

Rule discharged. (*b*)

(*a*) The rule appears to be that the vendor must get the transfer completed, and that is not done until the vendee's name has been entered in the company's books in place of the vendor's.

(*b*) When shares are mortgaged, or a lien obtained thereon, notice of such lien must be given to the company or the lien will be lost as against a purchaser for value—*Cumming* v. *Prescott*, 2 Y. & C. 488.

REGINA v. HUMPHREYS.

Evidence of party indicted inadmissible.

The defendant on his trial upon an indictment cannot give evidence for himself; nor can his wife be admitted as a witness.

(Q. B., M. T., 15 Vic.)

In this case it was reserved for the opinion of the court, under the late statute 14 & 15 Vic., ch. 13, whether upon the trial of the defendant at the last assizes for the counties of Leeds and Grenville, he, the defendant, offering himself as a witness in his own behalf, and his wife being offered as a witness for him, were both properly rejected as being incompetent by law.

Hagarty, Q. C., for the defendant. *Richards* contra.

ROBINSON, C. J.—We have no doubt that they were both incompetent; that the first stat. 12 Vic., ch. 70, only relieves against the objection on the score of pecuniary interest, and has no reference to the ground on which a defendant in a criminal case, whether having such an interest or not, has been always hitherto rejected; and that the latter statute, 14 & 15 Vic., ch. 66, has no reference to the defendants upon the trial on indictments, because neither crime nor interest was the ground on which they had been hitherto excluded.

The stat. 12 Vic., ch. 70, only relieves against incapacity from crime or interest, by which we understand is meant interest of a pecuniary kind. The defendant on trial for a crime stands in neither situation, nor does his wife. They have both a deep interest in the event, but not such an interest, we think, as it was the object of that statute to affect.

Then the 14 & 15 Vic., ch. 66, only *recites* that it is desirable that in no case should *there be any exclusion of any person* from giving evidence. It does not enact that there shall *in no case* (*i. e.* civil or criminal) *be any exclusion* of any person from giving evidence. If it did, then, under such enacting words, we might feel ourselves bound to admit a prisoner's wife, and the prisoner himself; admitting that his statement on oath could be included in the words "giving evidence (*a*)."

But what the last mentioned act really does is only this: it repeals the proviso in the first act which excepted from those to be admitted as witnesses, notwithstanding the objection of crime or interest, the parties

(*a*) This act, as well as the act 12 Vic., ch. 70, was afterwards repealed by 16 Vic., ch. 19—which is now consolidated in the Consolidated Statutes of Upper Canada, ch. 32.

individually named in the record, and thereby leaves the first statute to operate as if there were no such exception; in other words, it prevents crime or interest from being any longer an exception, even with respect to those individuals who are named as parties in the record.

But neither the defendant on his trial upon an indictment, nor his wife, were before excluded from giving evidence, "*either on account of crime or of interest;*" by which we mean, as we take the legislature to do, pecuniary interest. They neither of them stood in that situation that the verdict, according as it went one way or the other, would bring money or property to them, or take it from them, or render them liable to others.

An accused criminal on his trial, and his wife, might have an interest of this nature, it is true; but that had not been the sole ground, if at all the ground, on which their evidence was in all cases, and under all circumstances, rejected. They had also an interest to save life, character, liberty; regarding which interest as a ground of incompetency, and regarding the general policy of the law excluding prisoners on their trial from giving evidence in their own favour, and their wives from giving evidence either for or against them, the 12 Vic., ch. 70, did not profess to make any provision.

I will only add, for my own part, that this view of the law seemed to me to be clear, when the same points were raised in criminal cases before me on the last circuit; and that, when I rejected the evidence of the prisoner and of his wife, as I did in a case at Niagara, it seemed to me that their admission was not pressed with any confidence at the bar. (*a*)

WILKES AND BUCHANAN, PRESIDENT AND TREASURER OF THE BRANTFORD BUILDING SOCIETY v. CLEMENT AND REID.

Building Society—Bond—Surety—Secretary and Treasurer.

Debt on a bond given by C. & R. conditioned for the due performance by one D. of the office of secretary and treasurer to the Brantford Building Society. *7th plea*—That the office is an annual one: that the said D. was appointed for

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(*a*) There is at present a conflict between the Courts of Queen's Bench and Common Pleas as to the right of a defendant to cross-examine a co-defendant generally or only on his examination in chief. The Queen's Bench, in *Lamb v. Ward* (18 U. C. Q. B. 804), decided by a majority that such cross-examination was not admissible; but the Common Pleas, in *Dickson v. Pitch* (11 U. C. C. P. 146), were unanimously of the contrary opinion, and held that a party to a suit, when called and examined as a witness at the instance of the opposite party, is rendered competent as a general witness in the cause, and that his incapacity by reason of interest is thereby wholly removed.

one year: that the defendants became sureties for the term of one year, and no longer: and that during such term D. faithfully performed the duties.

Replication—That the defendants did not become sureties for the period in the plea mentioned, or for any other specified time.

Held, on demurrer: Replication good.

Under the Building Society Act, 9 Vic., ch. 90, it is not essential to the validity of a bond given for the performance of the treasurer's duties, that such treasurer should be joined in it with his sureties.

9th plea—That D. did not, before his appointment, become bound in a bond, with two sufficient sureties, for the due performance of his office, in pursuance of the statute, &c.

10th plea—That the said bond is not a security taken in pursuance of the statute, by a bond entered into by the said D. with two sufficient sureties.

Held, on demurrer: Both pleas bad for uncertainty.

11th plea—That the rules of the society did not provide that the treasurer, or other principal officer, should, once at least in every year, prepare a general statement of the funds and effects, according to the statute.

Replication—That the rules of the society did provide that the statement referred to in the plea should be made at least once in every year, according to the form of the statute, &c.

Held, on demurrer: Replication good.

(Q. B., M. T., 15 Vic.)

Action on a bond against the defendants, as sureties for the due performance by one D. of the office of secretary and treasurer to the Brantford Building Society.

7th plea—That the said office is an annual office, and that the said D. was appointed to the said office on, &c., to perform the duties thereof for one year, thence next ensuing: that the defendants entered into the said writing obligatory for the said term of one year, and no longer: and that during the said term the said D. faithfully executed his office.

9th plea—That the said office was, before and at the time of making the said writing obligatory, and before and at the time of the appointment of the said D., an office touching and concerning of the receipt monies collected for the purposes of the said society: and that the said D. did not, before his admission to the said office, become bound in a bond with two sufficient sureties for the just and faithful execution of the said office, &c., in pursuance of the statute in that case made and provided.

10th plea—That the said writing obligatory was not, nor is, a security taken in pursuance of the statute in that case made and provided, by a bond entered into by the said D. with two sufficient sureties, conditioned, &c. &c.

11th plea—That the rules of the said society did not, at the time of the making of the said bond and of the appointment of the said D., nor at any time before or since, provide that the treasurer or other principal officer of the society should, once at least in every year, prepare, or cause to be prepared, a general statement of the funds and

effects belonging to the said society, according to the form of the statute, &c.

Replication to the 7th plea—That the defendants did not become sureties for the said D. for the period in that plea mentioned, or for any other specified time.

Demurrer to the 9th plea—Because it contains no defence to the action; and because it does not appear whether it is intended to tender an issue on the joining of the said D. in the bond with his sureties, or on the sufficiency of the sureties.

Demurrer to the 10th plea—Because it tenders an issue in law, whether or not the bond was so taken as to be legally binding on the defendants; and also tenders the immaterial issue whether the sureties were sufficient, and whether the said D. signed the bond with his sureties; and because it does not point out in what particular the bond was not legally taken.

Replication to the 11th plea—That the rules of the said society did, at the time of the making of the said bond and of the appointment of the said D., provide that the statement referred to in the plea should be made at least once in every year, according to the form of the statute, &c.

Demurrer to the replication to the 7th plea—That the said replication confesses that the office was an annual office, and does not avoid that confession by shewing a breach during the period in the plea mentioned; and that it attempts to raise an issue upon the law and not on the facts; and that the replication should have denied that the office was an annual office, or that the said D. was appointed as in the plea alleged.

Demurrer to the replication to the 11th plea—Because the averment that the rules of the said society did provide that the statement referred to in the plea should be made, &c., is no answer to the material allegation that they should provide that the treasurer or other principal officer should make the statement, as the statute requires.

M. C. Cameron, for the demurrer, cited *Peppin et al.* v. *Cooper*, 2 B. & Ald. 431.

Vankoughnet, Q. C., contra, cited *The Attorney General of Jamaica* v. *Manderson*, 12 Jur. 388; *The London, Brighton and South Coast Railway Company* v. *Goodwin*, 3 Exch. Rep. 320.

ROBINSON, C. J.—The ninth and tenth pleas both assume that the bond into which these defendants have entered is illegal, and not binding upon them, because D., the treasurer, on whose behalf they became sureties, is not joined with them as obligor in the bond. But we think we can only look upon the ninth clause of the Building Society Act, 9

Vic., ch. 90, as directory. The legislature, no doubt, enjoined that the treasurer should himself become bound, as well as find two sureties, for the due discharge of his duties; but it would be very unreasonable to hold, that because the company has not all the security which the legislature intended, they shall therefore have none.

There are cases (as in the instance of sheriff's bonds taken for ease and favour, but not in the form permitted by the statute,) where, from regard to public policy, it has been held, that bonds taken in any other form or manner than the act directs shall be void: but we do not conceive that the present case is one of that class. There can be nothing prejudicial, or against public policy, in holding these defendents bound by their bond, although the principal is not joined with them. Nothing has taken place to alter their position since they gave their bond, to which they must have known the treasurer was not a party. The case of *Peppin* v. *Cooper et al.*, 2 B. & Al. 431, is rather an authority against the objection than in its favour: for there is nothing in this act declaring that the bond shall be void if not executed by the officer.

Besides, by comparing these pleadings with the pleadings in that case, it is evident that the objection intended to be raised here is not properly brought out. The bond is not set out on oyer, as it was in that case; and it was therefore not apparent to us on the face of the instrument that Dee is not a party. The declaration, in averring that these defendants were bound, is not to be taken as averring that they alone were bound; and the ninth plea does not assert that Dee is not a party to the bond, but says, in general terms, that the bond is not taken in pursuance of the statute—not pointing out in what particular it deviates For all that appears, the defendant may mean that these are not sufficient sureties, or that the condition is not in the exact words prescribed by the statute, or that the bond was not taken until after Dee had taken upon him the duties of the office, whereas the statute requires it to be taken before. Indeed I was under the impression, until I heard the case argued, that this last was the objection intended to be taken by the plea.

Then the tenth plea is equally uncertain in this respect; it leaves us to conjecture in what respect the bond does not comply with the statute. It does not say, nor does it otherwise appear to us, that Dee did not execute the bond.

The seventh plea and the replication to it are to be considered, the defendants having demurred to the replication. We see nothing in the act or by-laws set out which make the office of treasurer an annual office, and yet that is the very foundation of the seventh plea. The

defendants might, however, have only undertaken for one year; but that this is not what they say, or can be fairly understood to mean: they first assert that the office is an annual one, and then, without denying that the plaintiff has set out their obligation truly (which if they intended to deny they should have pleaded *non est factum*, or set out the bond on oyer and demurred), they plead that the defendants entered into the bond as security for one year. They do not assert that the plaintiffs have set out the condition untruly in words, or that the bond does limit their engagement to a year, but only that they became sureties for him for a year, by which I suppose them to mean that the office, being an annual office, (which seems to be falsely assumed) their undertaking for the due discharge of its duities must, in legal effect, be limited to the year. The plaintiffs answered this by saying that the defendants did not become sureties *for the period in the plea mentioned, or for any other specified time.* This surely does deny the truth of the plea, whether the defendants intended to rely upon an inference of law, or meant to affirm that such was the very language of the condition. We think *specified* time is tantamount to saying for any limited time—that is, for any time particularly expressed. In the case which was cited in the argument, and which I have before referred to, of *Peppis* v. *Cooper*, a defence of the same nature was pleaded, and was sustained; but there the plea was, that the officer was only appointed for a year, not, as in this case, that the office was an annual office, which rests the defence upon a legal principle rather than upon a fact, and we see nothing to shew that the office is annual.

The demurrer to the replication to the 11th plea must also, we think, fail. That plea is founded on the 15th section of the statute, which does require an annual statement to be made out and exhibited to the directors: but that is a duty not exclusively incumbent on the treasurer; and if it were, still his omission to perform it would constitute no reason why his sureties should be released from their engagement for his faithful discharge of his duty. And if we regard it as an omission of the society, who are the real plaintiffs in this action, the omission would still be no reason, in a court of law, why the defendants should not perform the condition of their bond. They must save the penalty of their bond by shewing a performance of the condition, or an absolute incapacity to perform it by the act of God or of the law, or a clear legal discharge. There are some cases, however, in which courts of equity would relieve where courts of law cannot; but I do not express the opinion that this is one of them.

Judgment for the plaintiffs on demurrer.

The Municipal Council of Frontenac, Lennox, and Addington v. Chesnut et al.

Turnpike—Contract for rent—Tolls—Estoppel—Agency.

A declaration in covenant stated that, by indenture made between the plaintiffs and defendants, the plaintiffs demised to the defendants the tolls authorised by law to be received upon a certain turnpike road, for the term of one year; that the defendants covenanted to pay a certain rent therefor; and *that by virtue of the said demise the defendants entered and were possessed for the term so to them granted.* Breach, non-payment of the rent.

Held on demurrer, that the defendants were estopped from denying the demise, and were bound by their express covenant to pay the rent, and that the non-execution by the lessors, under such circumstances, was no defence.

And that they were also estopped from alleging the want of a common seal of the plaintiffs to the lease, or from pleading that they had no authority to demise.

Held also, that a plea that the said indenture was not signed by the plaintiffs, or by any agent of theirs authorised in writing, was bad.

(Q. B., M. T., 15 Vic.)

The Municipal Council of the United Counties of Frontenac, Lennox and Addington sued the defendants in an action of covenant for arrears of rent, averring in their declaration, that by indenture made between themselves and the defendants, they (the plaintiffs) demised to the defendants the tolls authorised by law to be received upon a certain turnpike road, for the term of one year, at a certain rent, payable monthly: that the defendants covenanted with the plaintiffs that they would pay the said rent to the plaintiffs in equal semi-annual instalments on certain days named: *that by virtue of the said demise the defendant entered and were possessed for the term so to them granted:* that a certain sum became due for rent: and that the defendants have not paid it.

The defendants craved oyer of the indenture, and it was set out; and it appeared on the face of the oyer as set out; that the alleged indenture was signed and sealed by D. Roblin, and by the three defendants. There was no mention made of D. Roblin in the body of the instrument, and nothing added to his name to shew that he had by any statute a right to represent the corporation, or in what capacity, or why he was an executing party. The indenture purported to be made by the Municipal Council of the United Counties of Frontenac, Lennox, and Addington, of the first part, and the three defendants, Chestnut, Foster and Smyth, of the second part: and in those covenants binding on the defendants the term was spoken of as created thereby, and the corporation was stated to have demised by their indenture.

The defendants pleaded, 1st. That the plaintiffs did not demise to them in manner and form, &c.

2ndly. That the said indenture was not signed by the plaintiffs, or by

any agent of theirs authorized by writing: nor was any lease of the said premises, so by the said indenture witnessed to have been demised for the said term in the declaration mentioned, put in writing and signed by the plaintiffs.

3rdly. That the said indenture was not sealed with the common seal of the plaintiffs, or signed by any agent of theirs; nor was any lease of the said premises, for the term in the declaration mentioned, made and executed under the common seal of the plaintiffs, or put in writing and signed by any agent of the plaintiffs properly authorized.

4thly. That at the time of making the said indenture there was no by-law of the plaintiffs authorizing them (the plaintiffs) to make the demise in the declaration mentioned.

The plaintiffs demurred to all these pleas, assigning for causes,

As to the first plea, that it contains no answer to the declaration; and that the defendants should have pleaded *non est factum*, or demurred.

As to the second plea, that it contains no answer to the declaration, and is an argumentative denial of the demise, and puts in issue matter of law.

And to the third and fourth pleas the same causes were assigned as to the second.

Kirkpatrick, Q. C., for the demurrer, cited *Dancer* v. *Hastings*, 4 Bing. 2; *Palmer* v. *Ekins*, 2 Str. 817; *Bluke* v. *Foster*, 8 T. R., 487; *Taylor* v. *Needham*, 2 Taunt. 278.

J. A Macdonald, Q. C., contra, cited *Wilson et al.* v. *Woolfryes*, 6 M. & S. 341; *Cardwell* v. *Lucas*, 2 M. & S. 111; *Berkeley* v. *Hardy*, 5 B. & C. 355; *Charles Lord Southampton and J. Drummond* v. *Brown*, 6 B. & C 718; *Rose et al.* v. *Poulton*, 2 B. & A. 822.

ROBINSON, C. J., delivered the judgment of the court.

As to the first plea denying the demise, if that be a good plea under the circumstances, the plaintiffs must fail in this action for the specific rent, although the defendants, entering as their tenants, have enjoyed for the whole time for which the rent is claimed, and have expressly covenanted to pay the sum claimed as a consideration for that enjoyment; for we see plainly that the plaintiffs did not in fact demise by indenture; and so, if the plaintiffs had taken issue on this plea, denying the demise, they could not have proved the affirmation. They would, in that case, be left to seek another remedy, either by action for use and occupation, (which however, might not be found applicable to the case of tolls received), or perhaps by action for money had and received,

treating the tolls as received for their use. The latter, however, would be a very imperfect way, because the plaintiffs have no knowledge what sums may have been received for tolls, and have no means of proving it. It is true that a jury might be warranted in assuming that the defendants received at least as much as they were willing to pay for the year's enjoyment; but they could not be called on as a matter of right to do so. We are of opinion, however, notwithstanding the lease has not been executed by the lessors, at least not in a manner legally binding on them, yet that the defendants having, as the declaration avers, entered and enjoyed during the term for which the rent is claimed, are bound by their express covenant to pay the rent; and that the non-execution by the lessors is, under such circumstances, no defence. As a general principle, a man is bound by his covenant under seal, though made without consideration, unless where it has been entered into not gratuitously, but on conditions which have not been fulfilled on the other side. Here the defendants have expressly covenanted to pay to the plaintiffs the exact amount now claimed, and to pay it for the enjoyment of the tolls which they have actually had; and, though the lessors have not actually executed the lease, or have only done so in a manner not binding, still the good sense of the thing is to look upon the covenant to pay the rent to the plaintiffs as an independent covenant—the defendants not being in a situation to claim an exemption by reason of eviction, or any obstruction to their enjoyment. The defendants could not have pleaded that the plaintiffs had no right to make the demise; and yet that would have been a fact as conclusive against there being a valid demise as a defective execution, or a total omission to execute, can be.

In *Wilson et al.* v. *Woolfryes*, 6 M. & S. 341, there could be no question about the plea, which was the ordinary plea of *non est factum*, and which of course only denied that the deed was the deed of the defendant; but it is true that the court held there (though Bayley, J., doubted, and I think not without reason) that the plaintiffs could not succeed on that issue, because they had themselves not all executed the indenture. That case presented, however, a different question, and in a different form; and for all that appears the plaintiffs there were claiming their rent merely on the ground of having created the term; for it is not averred that the defendants had entered and enjoyed.

I do not, however, say that this case is not difficult to be reconciled with a judgment sustaining the demurrer to the first plea in the case before us. So also *Berkeley* v. *Hardy*, 5 B. & C. 355; *Rowe et al.* v. *Poulton et al.*, 2 B. &. Ald, 822; and *Cardwell* v. *Lucas*, 2 M. & W.

111, in appearance at least, make strongly against the plaintiffs on this demurrer; not, indeed, the decision in *Rose* v. *Poulton*, because there the court sustained the action on the covenant to pay an annuity, although the other party to the deed had not executed; but in giving judgment, Lord Tenterden, while he did not assent to the position that a mere failure of consideration would in all cases relieve a party from the obligation of his deed, remarked that "in the case of a lease not executed by the lessor, it certainly does, because, *in default of such execution, there is no lease.*" This opinion, so broadly expressed, has been relied on in this case, as it has in subsequent cases in England, for supporting the position, that a lessee who has entered and enjoyed for the term will nevertheless not be liable on his covenant to pay rent, unless the lessor has executed the deed.

In *Cardwell* v. *Lucas* it was denied in argument that it could be taken as an authority to the full extent, for that in that respect it was an extra-judicial opinion, and the other judges said nothing to confirm it; certainly the judgment in *Cardwell* v. *Lucas* proceed on a peculiar ground, independent of that principle, and one that does not apply in the present case, where the lessors named in the deed are themselves suing the covenantors. In such a case, where the intended lessee has enjoyed during the term, the statement of demise should in reason be considered as a matter of inducement not traversable when he is sued on his own express covenant to pay simply a sum of money, and not, as in some of the cases, to do certain acts *during the term*, which implies a necessity that there should in fact have been a term legally created; and I am glad to find that what is so clearly in accordance with the justice of the case seems well supported by authority. It is stated in *Rex* v. *Stacey*, 1 T. R. 4, by Buller, J., that "where a person assents to an act, and derives and enjoys a title under it, it shall not lie in his mouth to impeach it."

In Com. Dig. Pleader, 2 W. 48, it is laid down, that the tenant cannot plead *non demisit* if the demise is by indenture, which I take it to be certainly true where the tenant has entered and enjoyed.

In *Parker* v. *Manning*, 7 T. R. 539, Ashurst, J., observes that "so long as the lessee continues to enjoy the land demised, it would be unjust that he should be permitted to deny the title *under which he holds possession*," which observation it seems reasonable to apply not merely to the title of the lessor in the land, but to the validity of the lease under which the lessee has entered and enjoyed, and by his covenant admitted himself to be taking. In *Hudson et ux.* v. *Sharpe et al.*, 10 E. R. 350, the plaintiffs sued the defendant on a covenant to

repair. The lease required to be registered under a particular local statute. The defendant pleaded, that it was not registered, and was therefore void; to which plea the plaintiff demurred The court held the plea bad, for that the defendant had had all the benefit which he could derive under the lease, and could not set up that it was not registered. And Bayley, J., said, "here the defendant has enjoyed under the lease during the time in which the breaches of the covenant were committed; and therefore, even if the lease were void," (which, as between the parties, the court held was not the case,) "I should have been much disposed to have considered that he was liable on his covenant as an independent covenant."

Now that was a covenant to repair *during the term*, and was therefore not so strong a case in favor of the plaintiff as the present, which is a covenant to pay a sum of money, which would undoubtedly have been a good covenant if it had bound the defendants to pay the same sum to the plaintiffs provided they should be allowed to receive the tolls for a year, without explaining what connection the plaintiffs had with tolls, and without alleging any demise.

What Bayley, J., threw out somewhat doubtingly in this case has been expressly adjudged in later cases. I refer particularly to *Cooch et al.* v. *Goodman*, 2 Q. B. R. 580, in which the judgment of the court is, in my opinion, decisive in favour of the plaintiffs on this demurrer —supporting the principle that when the lessee in an intended lease enters and enjoys the term, he cannot dispute his liability under his covenants with the intended lessor on the ground that such intended lessor did not execute.

The case of the *Fishmongers Company* v. *Robertson*, 5 M. & G. 131, is strong to the same effect. I refer also to *Chanter* v. *Dewhurst et al.*, 12 M. & W. 823; and to *Pistor* v. *Cater*, 9 M. & W. 315, though the last case is not so much in point as *Cooch* v. *Goodman*.

Mr. Platt, in his work on leases (vol. 2, pages 15 and 396) and Mr. Addison in his treatise on contracts, page 185, evidently treat the principle I have stated as being established by these latter decisions. Mr. Addison's language is express.

"If a lease (he says) be agreed upon, and the lessor does not execute his part, so that the term of years in the land bargained for is not created and transferred to the intended lessee, the covenants in the indenture sealed by the latter cannot be enforced: for the foundation of the covenant failing, the covenant also fails. If, however, the intended lessee has entered into possession of the land, and has had the use and enjoyed the premises intended to be demised to him

during the time that the breaches of covenant were committed, he will not be permitted to rely on the non-execution of the lease by the intended lessor as releasing him from his liability, but he is bound to fulfil his covenant as an independent covenant."

The declaration in this case does expressly allege that the defendants entered and enjoyed for the time for which the rent is claimed; and they are estopped, while they admit this, from denying the demise, and giving that as a reason why they should not pay the rent which they have expressly covenanted to pay to these plaintiffs for what they have so enjoyed; or from alleging the want of a common seal of the plaintiffs to the lease; or from pleading, as in the fourth plea, that they had no authority to demise.

As to the second plea: It has been determined in *Aveline et al.* v. *Wilson*, 4 M. & G. 801, and in other recent cases, that even when the term is much more than three years, and so within the Statute of Frauds, this would be no good plea. The Statute of Frauds, at any rate, has nothing to do with this case of a lease for one year; and indeed this plea seemed not to be attempted to be supported on the argument. There should be judgment for the plaintiffs, we think, on all the demurrers.

My attention has been called to a late case of *Pitman* v. *Woodbury* in the Court of Exchequer (8 Exch. Rep. 4) as tending to shake the authority of *Cooch* v. *Goodman*. If it had expressly over-ruled it, we must then have considered by which of the conflicting decisions we should abide; and that must have depended upon which of the two seemed to us to be best supported by previous authority as well as by reason; for we are not, of course, to give way to a decision of the Court of Exchequer directly at variance with a previous decision of the Queen's Bench, merely because it is the latest. But that case does not overrule *Cooch* v. *Goodman*, though it intimates a doubt of its soundness. The court expressly says that the two cases are distinguishable; and they decided *Pitman* v. *Woodbury* as they did, assuming *Cooch* v. *Goodman* to be correct. I think it quite clear that *Pitman* v. *Woodbury* was rightly decided; for there it was pleaded that the defendant never had entered or enjoyed under the lease, but on a distinct footing.

Per Cur.—Judgment for the plaintiffs on demurrer.

ORSER v. CORNELIUS MOUNTENY & JOSEPH MOUNTENY.

Ship Registry Act, 8 *Vic.*, *ch.* 5, *sections* 18, 16, 21—*Necessity of compliance with, to effect a valid sale of shares.*

Where an action was brought for breach of contract in refusing to sign certain promissory notes, the sale and delivery to the defendants of shares in a schooner being alleged as the consideration for the promise; and it appeared that the plaintiff had surrendered his interest to the defendants, and that they had continued in exclusive possession of the vessel; but that no assignment had been made as the statute directs, and no transfers indorsed on the registry, nor any new certificate of ownership granted, the court ordered a non-suit.

But if the defendants had given their notes, they could not have resisted payment on the ground that they had not received a valid title.

(Q. B., M. T., 15 Vic.)

Assumpsit—1*st count*, on a special agreement, setting forth that on the 1st of September, 1849, in consideration that the plaintiff, at the request of the defendants, would sell and deliver to them $\frac{21\frac{1}{2}}{64}$ shares of the schooner Primrose at the price of 115*l.*, the defendants promised to pay for the same on the delivery thereof by three promissory notes (for certain sums, payable at certain times, as in the declaration mentioned): that the plaintiff, confiding in their promise, on the 3rd of September, 1849, sold and delivered to the defendants the said shares, but that the defendants have refused to make and deliver the notes according to their agreement.

In the 2*nd count* the plaintiff declared that on the 3rd of September, 1849, in consideration that the defendants were indebted to the plaintiff in a large sum—viz., 115*l.*—for goods sold and delivered by the plaintiff to the defendants, the defendants undertook and promised the plaintiff to make and deliver to him *on request* their promissory notes (as in the first count): that the plaintiff afterwards—viz., on the 4th of September, 1849—requested the defendants to make such notes, but the defendants refused, &c.

In the 3*rd count* the plaintiff declared, that in consideration that the defendants were indebted to him in a large sum on *an account stated*, they promised to make and deliver the notes, and averred a subsequent request and refusal.

Common counts were added for goods sold and delivered, money received, and on an account stated.

Pleas—1. Non assumpsit.

2. To the first count—that the plaintiff did not sell or deliver to the defendants the said $\frac{21\frac{1}{2}}{64}$ shares of the said schooner, &c.

2. To the second count—That they were not indebted to the plaintiff in 115*l.*, or any part thereof, in manner and form, &c.

4. To the third count—a similar plea.

The facts proved at the trial were these:—On the 13th of August, 1847, James Spencer and John Stanton made the declaration required by our statute 8 Vic., ch. 5, sec. 2, that they were sole owners in equal proportions of the vessel called "The Primrose," of the burthen of 29 tons, built at Athol in the county of Prince Edward in 1844, being a decked schooner; and took out a certificate of ownership accordingly for 64 shares each. On the back of this certificate of the collector at Picton there was written a memorandum of ownership being assumed in 1849 by Cornelius Mounteny and Joseph Mounteny, each 64.

It was proved by *viva voce* testimony, that the shares in the vessel had, after the 13th of August, 1847, been owned by different persons, who had not, as it seems, taken any measures to have their interest registered; and for all that appears, the transfers were not made by writing.

One Hazard had in this way become actually possessed of two-thirds of the schooner, and the plaintiff Orser of the other one-third. These defendants, in 1848 or 1849, bought Hazard's two-thirds in the manner mentioned; and the plaintiff having sold out his one-third to one Waters, and the defendants wishing to purchase it and thus become sole owners, they agreed with the plaintiff verbally to give him 500 dollars for his share deducting 30 dollars on account of some claim they had. This agreement was made in the presence of witnesses, on board of the schooner, and while these defendants were in possession of, and Cornelius Mounteny was sailing her as master.

The plaintiff surrendered up to them verbally his interest, and left them in possession of the vessel; and they were to call upon him the same evening and give their notes for the price, as stated in the declaration. This transaction took place on or about the 1st of September, 1849.

The defendants continued in exclusive possession of the vessel, and on the 15th of September, 1849, Cornelius Mounteny had her in the port of Picton, and upon the collector inquiring into the change of ownership which he had heard some report of, he stated that he and the other defendant were then the sole owners, having purchased out Hazard and the plaintiff.

The defendants, though they kept the schooner, failed to go as they had promised and give their notes; and being asked by the plaintiff some time afterwards to do so, they excused themselves on account of

the hardness of the times, and made some objection which, in the apprehension of the witnesses was made in general terms, to the sufficiency of the bill of sale or writing which they spoke of as having been received by them from the plaintiff. They were asked by the plaintiff to get any one to draw a more regular one if they desired it, which he said he would execute at once. They did not deny that they bought the shares; and pointed out no specific defect in the writing, which they only spoke of, but did not produce. Their chief reason for not signing the notes, as they stated, was that the times were too hard for them to give their notes.

The plaintiff had given notice to the defendants to produce the assignment from Spencer & Stanton to Joseph Mounteny, William Hazard, and the plaintiff, and the bill of sale from the plaintiff and these defendants; but no transfers were produced on the trial. The defendants objected that there was no proof that the plaintiff owned the one-third, or any interest which he states himself to have sold to the defendants: and 2ndly, that there was no legal evidence to support his averment, which the defendants had traversed, that he had "sold and delivered" his shares to the defendants; for that there was no assignment from the plaintiff such as the statute requires, reciting the certificate of ownership—in fact, no assignment shewn at all except by parol. These objections were reserved as grounds on which a non-suit might be moved.

The jury found that there was a written bill of sale from the plaintiff in possession of the defendants, and gave their verdict for the amount of the notes and interest (129*l.* 5*s.* 7*d.*) which had been drawn, and tendered to the defendants for signature, but which, contrary to their undertaking, they refused to sign.

Patterson, for the defendants, moved to enter a non-suit on the points reserved at the trial, or for a new trial on the law and evidence, and for misdirection. He referred to 8 Vic., ch. 5, and cited *Marsh* v. *Robinson*, 4 Esp. 98; *Camden et al.* v. *Anderson*, 5 T. R. 709; *Tinkler et al.* v. *Walpole*, 14 East 226; *Pirie et al.* v. *Anderson et al.*, 4 Taunt. 652; *Sherwood et al.* v. *Coleman*, 6 U. C. R. 614.

Fitzgerald, contra, cited *Hunter* v. *Parker et al.*, 7 M. & W. 322.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the defendants are entitled to have the rule made absolute for a non-suit.

If the defendants had given their notes when they got possession of the vessel, and had been sued upon them, they could not have resisted payment on the ground that they had not received a valid title; because,

having the possession and use of the vessel, and the enjoyment of the plaintiff's share in her, they could not set up that there was a total want of consideration, and must therefore have paid their notes. But here an action is brought against defendants for not giving the notes, as on a special contract; and the sale of the vessel is averred as the consideration, which sale is distinctly traversed. Proof of the sale lay on the plaintiff, and although the jury might have been allowed to infer that a writing of some kind was given by the plaintiff, yet the evidence shewed clearly that the transfer had not been indorsed on the registry, and that there had not been a new registry either of the plaintiff or defendants as owners of these shares. Stanton & Spencer were still the registered owners. The Ship Registry Act is too express to be got over. The cases which have arisen on similar provisions in the British statute shew that the plaintiff cannot for any purpose set up a sale on such evidence only. I apprehend he may bring trover against the defendants, or claim to be still the owner of the shares, as the defendants have disaffirmed the sale to them.

Rule absolute for non-suit (*Rolleston et al.* v. *Hibbert et al.*, 3 T. R. 406).

Hughes v. The Mutual Fire Insurane Company of the District of Newcastle.

Mutual insurance—Debt on bond—Award of arbitrators.

The plaintiff insured his property with the defendants; upon its destruction by fire a dispute arose as to the loss, and the matter was referred to arbitration. After the fire, but before the award, the plaintiff assigned the bond of submission, the policy of insurance, and the money due thereon, to one H. G. H.

Held, that the assent of the defendants to the assignment was not necessary.

Held also, that the assignment of the submission bond did not, under these circumstances, by vesting the interest in the assignee, affect the legality of the award made under it.

Held also, that the act abolishing districts (12 Vic., ch. 78) does not take away from the defendants the name given to them by their charter.

Semble, That the making of the award is not admitted by the pleading in this case.

But *held*, that it was sufficiently proved by shewing that the defendants had acted upon it by paying a portion of the sum awarded, and that their officer had stated in writing the particulars of the award, and the sum remaining due on it.

(Q. B., M. T., 15 Vic.)

Debt on bond in penalty of 1250*l*.

Pleas—1. Bankruptcy of the plaintiff, and appointment of one Fowkes to be his assignee, who is thereby entitled to the said supposed debts, sums of money and cause of action in the declaration mentioned.

2. As to 232*l.* 19*s.* 5*d.*, payment; which latter plea was specially demurred to, and the plaintiff had judgment on the demurrer.

The plaintiff replied to the plea of bankruptcy, that before his bankruptcy, and after the making of the bond, he, for the consideration of 400*l.* paid to him by one Henry George Hughes, assigned to him by deed the said bond and all the plaintiff's right to the same; that the defendants had notice of assignment before his bankruptcy, and that this action is brought for the benefit of Henry G. Hughes the assignee, who is alone interested therein, and that the assignee under the commission of bankruptcy has not claimed, and cannot claim any benefit from the cause of action in the declaration mentioned.

The defendant rejoined to this replication to the plea of the plaintiff's bankruptcy, that the assignment of this bond to Henry G. Hughes was made by the plaintiff in contemplation of bankruptcy, and for the purpose of giving him a preference over the other creditors, and was therefore void in law.

The plaintiff surrejoined to this, that the assignment to Henry G. Hughes was made on the 12th of March, 1846; that the commission of bankruptcy against the plaintiff issued on the 28th of July, 1846; that the assignment was made in good faith more than thirty days before the issuing of the commission, and without any notice to, or knowledge by Henry G. Hughes of any prior act of bankruptcy; and he traversed specially the alleged fraud.

The plaintiff then set out the bond and condition, which was to abide by the award of arbitrators on a certain difference between the plaintiff and the defendants, respecting the plaintiff's claim on a policy of assurance on certain goods of his insured by the defendants, which have been destroyed by fire; and averred an award made on the 23rd of March, 1846, that 570*l.* should be paid to the plaintiff for his loss; and suggested a breach in not paying the sum awarded.

The policy was granted by "the Mutual Fire Insurance Company of the Newcastle District" on the 13th of December, 1845. The fire occurred in the winter of 1846, and upon a dispute about the amount of loss, the plaintiff and the defendants, on the 4th of March, 1846, referred the matter to arbitration. No award was produced at the trial, but the deputy sheriff swore that, having in that spring several executions in his hands against the plaintiff, the award was given to him by one of the arbitrators by the plaintiff's direction, and that he gave it to Mr. Sidney Smith, his attorney, in order that he might receive the money from the defendants to be applied on account of the executions in the sheriff's hands. Mr. Smith was absent from Canada at the trial,

and the deputy sheriff swore that he had searched at his office and could not find it. A letter was put in from the secretary of the defendants, in which he spoke of the award, stated the amount awarded to be 570*l.*, and that the balance then unpaid upon it (29th June, 1846) was 337*l.* 0*s.* 5½*d.*, and the plaintiff relied upon this note, and the fact of part of the sum awarded having been paid, and also on the pleadings on the record, as being sufficient to establish the award.

A deed on the 12th of March, 1846, was put in, whereby the plaintiff assigned the policy to Henry G. Hughes. This was after the fire, but before the award made. On the same day the plaintiff executed an assignment under his seal of the bond of submission, and the policy of insurance, and the money due thereon, to Henry G. Hughes; and it was proved that on the 14th of April, 1846, a written notice of the assignment was sent to the company.

A commission of bankruptcy issued against the plaintiff on the 1st of June, 1846, which was afterwards superseded for irregularity. And another commission issued on the 28th of July, 1846, more than four months after the assignment of the policy.

It was proved that this assignment was made to secure the amount of a note of the plaintiff, payable to Henry G. Hughes, but the pleadings do not bring in question the fact of a good consideration for the assignment, but only whether it was given *bona fide* within the meaning of the bankrupt laws, or for the purpose of giving a fraudulent preference.

Upon that point the evidence was very strong to shew that before and at the time of making the assignment the plaintiff was in embarrassed circumstances, and apprehending bankruptcy, though apparently anxious to avoid being made a bankrupt; that he had led the Sheriff, who had executions against him, as well as various creditors, to expect that they would receive payment through his claim under the policy (the loss having occurred in January or February), yet that being much pressed, as it was sworn he was, to make the assignment to H. G. Hughes in order to secure a debt, he did so; that this assignment was taken through the intervention of a practising attorney, who strongly urged the plaintiff to make it, in order to secure a debt of about 200*l.*, and that it was then arranged that the plaintiff should receive the balance (170*l.*) on the award, and that amount was accordingly paid him—the intention being, that the residue should be received by H. G. Hughes, to whom the plaintiff was indebted for money borrowed, and should be paid over by H. G. Hughes to a creditor of his, Mr. Hall. The sheriff, it appeared, contended against this assign-

ment, and induced the company to pay over 200*l.* to him, to be applied on the executions, and indemnified them for doing so, so that he was in fact the defendant in this cause to that extent.

The learned judge directed the jury, that it was of no consequence that the plaintiff was in embarrassed circumstances when he made the assignment, if it were not a voluntary act of his own, and if he were pressed to give the security; that if it was obtained at the solicitation of the creditor, and did not spring from the desire of the debtor to give a preference to one creditor in contemplation of bankruptcy, it would be good.

The jury gave their verdict for the plaintiff for 524*l.*

Vankoughnet, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection; or to arrest judgment, on the ground that there is no such corporation as the "Mutual Fire Insurance Company of the Newcastle District:" that the benefit of an award against the defendants could not be assigned or made use of against them without their consent, which is not averred: and that the record does not show an assignment made under such circumstances and at such time as to avoid the effect of the bankrupt laws. He cited *Anderson et al.* v. *Gamble*, 8 U. C. R. 437.

Cameron, Q. C., contra, cited *Slatterie* v. *Pooley*, 6 M. & W. 664; *Boileau* v. *Ruttin*, 2 Exch. Rep. 665; *Hawkins* v. *The Municipal Council of Huron, &c.*, 2 U. C. C. P. 72; *Edmunds* v. *Grooves*, 2 M. & W. 642.

ROBINSON, C. J., delivered the judgment of the court.

We think that this case went to the jury with a proper direction. The pleadings left but the single issue for the jury to try, whether the assignment to H. G. Hughes was fraudulent or not, with reference to the bankrupt laws; and taking the facts to be as Mr. G. B. Hall represented them, it was not fraudulent; for he swore that he urged its being done, and Charles Hughes, according to his account, was not inclined to do it, but yielded to his solicitation.

There are some particulars in Mr. Hall's evidence which I cannot quite understand. He states the assigment to have been asked for, and obtained by him by the direction of his father, to whom the money was coming on a draft; but from which of the Hughes the money was due, and what amount remains due on account of it to the witness's father does not appear; nor is the reason explained why Charles Hughes should have met the draft when due, or why the assingment should have been taken to Henry G. Hughes in order to secure that debt, rather than to the person to whom the debt was due, or his agent. I

confess I do not find the evidence at all clear in this respect; but the pleadings do not raise any question on the sufficiency of a consideration for the assignment, but on the single ground that it was made in order to give a fraudulent preference to one creditor over the others, not questioning that the person to whom the assignment was made was a *bona fide* creditor, either on his own account, or as acting on behalf of another. I cannot make out on the evidence that there was such a sum to be covered in consequence of the transaction that he spoke of as would be at all equal in amount to the claim under the plea, or rather to the balance still due upon it, and for which the verdict has been given; and certainly no more should be withheld from the assignees of Charles Hughes the bankrupt, than whatever is still actually due of the debt which the assignment of the policy and the arbitration bond was intended to secure, The pleadings, however, do not open to us any question or difficulty of that kind. If this assignment is intended to be made use of for the recovery of a larger sum than remains due on account of the debt which it was given to secure, the assignees of the bankrupt must take their remedy, either by equity or by application for the equitable interposition of this court.

With respect to the exception taken, that the award was not legally proved, we do not think that we could hold what the plaintiff contended for—that is, that the reference by the defendant to the award in the second plea dispensed with the necessity of the plaintiff's giving evidence of it when he came to prove the truth of his suggestion which followed the issue joined on the other plea, though perhaps on fuller consideration that might be found correct, considering the nature and order of these pleadings.

But we are of opinion that there was no necessity for giving further evidence of the award than was given, when it was shewn that the defendants had recognized and acted upon it, paying a certain sum with express reference to the award and as part of the sum awarded, and had through their officer stated in writing the particulars of the award, and the sum remaining due by them upon it.

We see no difficulty arising from the late Territorial Division Act, which abolishes districts, for we find nothing in either of the statutes, 12 Vic., ch. 78 or 79, which should disable this corporation from continuing to use the name given to it in its charter, 6 W. IV., ch. 18, sec. 4. It is by that name it was incorporated, and there is nothing express or necessarily to be implied in any of the statutes, which compels, or, so far as I can see, warrants a change of the corporate name.

As to the objections, that the policy could not be assigned without

the assent of the corporation, and that the assignment, made as it was, and as it is stated in the record to have been made, does not place the policy out of the control of the bankrupt laws, we see nothing to support them. We think the plaintiff entitled to succeed upon the evidence on the only issued to be tried, and we find nothing in the record that makes against the plaintiff's right of action.

It was argued by Mr. Vankoughnet, on the part of the defendants, that if the assignment was valid, then the interest was in the assignee, and the award could not legally be made afterwards upon a submission of Charles Hughes, the person assured; but the submission was entered into before the assignment, and was according to the act, and the assignee, whose title is not otherwise impeached than by a question raised on the bankrupt laws, took his assignment with a knowledge of the submission bond. The evident intention of the assignment was to substitute him for the assured as to all subsequent proceedings, taking the thing up as it then stood, with a reference already assented to, which the assignee thus ratified, and which indeed he could not have avoided. We discharge the rule; begging it, however, to be borne in mind that our judgment is such as the evidence calls for in connection with these pleadings, and that we are not, by our judgment, declaring our conviction that the plaintiff has shewn a claim in his own right to the full amount of the verdict; or that the defendants might not, by taking another course, have restrained the amount of the verdict. It is unnecessary to determine that in disposing of this rule.

Rule discharged.

IN RE WRIGHT AND THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF CORNWALL.

Township Councils—Remuneration of members—By-law quashed.

Township Councils have no authority to pass by-laws providing for the remuneration of their own members.

(Q. B., H. T., 15 Vic.)

Brough obtained a rule on the defendants to shew cause why by-laws 11 & 12, passed on the 18th of June, 1850; No. 20, passed on the 28th of December, 1850; No. 22, passed on the 11th of January, 1851; and No. 30, passed on the 23rd July, 1851, should not be quashed, in so far as they direct or authorise payment of remuneration to the township councillors for the township of Cornwall.

No 12 was intituled "By-law authorising the payment of salaries to

public officers, and remuneration of councillors," and ordained that the several township officers and councillors therein enumerated should receive as salaries and remunerations the sums set opposite their names in a schedule annexed, to be paid out of the available funds of the township, and that they might be paid half-yearly by order of the council."

And in that schedule was, among other items—"Members of this council 6*s.* 3*d.* per day," &c.

No. 11, passed on the same day, (18th of June, 1850), ordained that the persons enumerated be allowed the sums set opposite their respective names.

In the list were—

James M. Dixon, town reeve	£1	17	6
John McDonald, deputy town reeve	2	8	9
Alexander McDonald	2	8	9
Donald McDonald	2	8	9
George J. Dixon	1	17	6

No. 20, passed on the 28th of December, 1850, ordained that there be paid by the township treasurer,

To James M. Dixon, reeve, for remuneration	£1	11	8
George J. Dixon	1	11	8
Donald McDonald	1	11	8
Alexander McDonald	1	11	8
John McDonald	1	11	8

No. 22, passed on the 11th of January, 1851, ordained that the township treasurer be authorised to pay

James M. Dixon, reeve, (not said on what account)	£0	6	8
John McDonald, deputy reeve	0	6	8
Donald McDonald, Esq	0	6	8
Alexander McDonald, Esq	0	6	8
George J. Dixon, Esq	0	6	8

The above three by-laws are all intituled, "By-law authorising the payment of orders and accounts approved of by the council.

No. 30, passed on the 23rd of July, 1851, was intituled, "By-law authorising the payment of salaries to public officers, and remuneration of township councillors."

It ordained that the treasurer should pay

B. G. French, (not saying why)	£3	8	9
John McDonald, reeve	3	8	9
Duncan Fraser, deputy reeve	3	8	9
James M. Dixon, Esq.	3	8	9
John A. Cameron, Esq	2	16	3

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion, which indeed we have already expressed on another occasion, that the by-laws moved against are illegal. It is the 7th sub-division of the 31st section of 12 Vic., ch. 81, which must govern the decision. That provides that township councils may make by-laws "for settling the remuneratian of all *township officers* in all cases where the same is not or shall not be settled by act of the legislature, and for providing for the payment of the remuneration by such act of the legislature, or by by-laws of the said municipality, provided and appointed for all township officers whatsoever."

Are townships *councillors* included in the words "township officers" used in this clause? We think it plain they are not. If there were nothing in any other part of the statute to shew what was intended, I should find it difficult to hold that they were included, for when we speak of the officers of a legislative body, we do not in general mean to include the members of that body; and when we consider that there is no other authority required to concur with the township council in passing their by-laws, it does not seem probable that it could have been intended to allow them by their own votes to divide as much of the public revenue among themselves as they pleased. If the legislature had intended to give them the power of voting salaries or allowances to themselves, they would surely have provided some checks upon the exercise of that power, and their not having done so is a convincing proof that they did not conceive that they were delegating any such authority to them; and this becomes evident when we look at the 41st section. For township councillors it does not seem to have been thought that any remuneration need be provided, because, having only to attend within the township, it might be reasonably supposed that they could return to their homes when the business of the day was ended; but in regard to the County councillors, the case was different; their attendance must subject them not merely to loss of time, but to considerable expense, and the legislature, attending to that circumstance, when they came to define for what purposes they may make by-laws, enact, by the 7th subdivision of the 41st section, that they may make laws "for the settling the remuneration to all *county officers*," exactly following the words of the 7th subdivision of the 31st clause; but not meaning to embrace in these words the members of the council, and not understanding that they were included, but yet meaning to remunerate them for their attendance, they deem it necessary to add a special provision for that purpose, which they do in the 9th subdivision, giving by it a power to the council to make by-laws for settling a rate at which the

town reeves shall be remunerated for their attendance at the council; and they are careful to provide this salutary check, that no such law which they may make shall take effect till two years have elapsed from its passing. There can be no plainer proof than this 41st section affords of what was meant by the 31st section. Mr. Brough very candidly directed our attention to the 132nd clause, as one which he understood was relied upon as giving implied authority to the township councils to vote a remuneration to themselves; but we think it does not embarrass the question, because, as county councillors may clearly be allowed a remuneration, the exception contained in the parentheses in that clause was proper on that account, and there is no warrant for extending it further than to them. We must therefore make the rule absolute for quashing such parts of these laws as relates to the granting of any remuneration to the township councillors for their attendance; and the late statute, 14 & 15 Vic., ch. 109, sec. 35, provides that the costs of this application must follow.

Rule absolute. (*a*)

BROWN v. THE MUNICIPAL COUNCIL OF THE COUNTY OF YORK.

Quashing by-law—Costs of—After application.

The 35th section of 14 & 15 Vic., ch. 109, has not a retrospective operation; and the Court therefore discharged a rule calling on the defendants to pay the costs of an application on which a by-law had been quashed before the passing of that act.

(Q. B., H. T., 15 Vic.)

In Easter term 1851 (the 25th of June) a rule was made in this court, after cause shewn, that a by-law passed by the Municipal Council of the County of York, for opening a road between lots 4 and 5 in the 4th concession of the township of Toronto, East of Hurontario Street, be quashed; the objection being that the road was not legally established by the by-law, the line of road not being described in the by-law, nor made certain by it, nor its width specified.

In Michaelmas term following (1851) *Cameron, Q. C.*, applied for, and obtained a rule on the defendants, to shew cause why they should not pay the costs of the rule quashing the said by-law, and of this application.

Hagarty, Q. C., shewed cause.

(*a*) Under sec. 269 of the Consolidated Municipal Act (U. C., cap. 54, p. 591), it is provided that the Municipal Council of every township and county may pass by-laws for paying the members of the Council for their attendance in Council, at a rate not exceeding one dollar and fifty cents per diem.

ROBINSON, C. J.—This application is made in consequence of parliament having, in August, 1851, passed an act, 14 & 15 Vic., ch. 109, (sec. 35), by which it is provided that whenever any by-law shall be or *has been* passed by any municipality, and such by-law *has been* or shall be quashed by any court having competent jurisdiction, such municipality shall pay all costs and expenses attending the quashing of such by-law. It is contended that this has a retrospective operation, and gives costs of applications which had been heard and determined before the passing of the act; but we do not think so, although the language will bear that construction. It has been repeatedly held, that where a statute is meant to have an *ex post facto* operation, that intention must be so clearly expressed as not to leave room for doubt. Now here, I think, it is not reasonable to imagine that the legislature intended that we should open a matter that had been fully disposed of, and, as we must suppose, properly in regard to costs, upon the law as it stood at the time, for the purpose of giving costs under a change of the law, which, where it applies, leaves nothing in our discretion.

The legislature, I quite admit, may have meant that; but I am not clear that they did, and it would be unreasonable, I think, to assume that they did, if the language they have used is not so explicit as to shew that intention plainly. They meant, I have no doubt, to give to persons injured by any by-law which had been quashed before this statute passed a remedy (where that would properly lie) against the municipality; but then the proceeding for that remedy would be a matter altogether prospective, and would be commenced and carried on after the act was passed. It would require no reversing or opening up of any matter that had been adjudged upon and finally closed.

As regards the giving costs of the application to quash a by-law, we consider that the statute means future applications, and that we must interpret the clause, as to this part, to mean that whenever thereafter it shall happen that any by-law has been quashed, the costs of the application to quash it shall be paid by the council. But I admit that the clause is so worded as to give much support to the claim made in this case to recover the costs of an application disposed of before the passing of the act. Our opinion, however, is against it.

Rule discharged—but not with costs.

THE QUEEN EX REL. CLARK V. MCMULLEN.

Contested election—Notice of disqualification—New evidence.

It is not necessary that the statement of facts, placed before a judge when a municipal election is questioned, should contain all the grounds on which the relator relies to entitle him to the seat, if the election should be set aside.

If there be a disqualification rendering a candidate ineligible, proper notice of it must be given at the time of election.

No new evidence will be received by the court on the examination of a decision of a judge in chambers as to a contested election.

Semble, That whether the court, or a judge before whom the relator brings his case, will go further than declare the election of the defendant void, or will proceed as well to seat the relator, is a matter of discretion not to be interfered with on appeal, (per C. J.)

(Q. B., H. T., 15 Vic.)

This case was decided by the learned Chief Justice of the Common Pleas, in Chambers.

In this term, *J. Duggan* obtained a rule on the defendant to shew cause why the judgment given there should not be altered and reversed in the following manner; by striking out the part of the said judgment numbered 3rd, and adjudging instead, that the relator is entitled to be substituted in the place of the defendant McMullen, as claimed in his statement, as town councillor for the third ward of the township of York; and altered also as to the 5th part, by adjudging instead thereof, that the relator be elected and returned to the said office, he having the greatest number of votes recorded in his favor next after the defendant, who was not qualified to be elected.

And also, as to the part of the said judgment marked "lastly," by adjudging instead thereof, that the relator be admitted to the said office in the place of the defendant—on grounds disclosed in affidavits and papers filed.

In the relator's statement he claimed that he was duly elected, and ought to have been returned: his ground of objection against the defendant, who had a small majority of votes, was, that the defendant was disqualified, being at the time of his election both assessor and collector for the ward for which the election was holden, and as such, was entitled to receive fees or remuneration out of the public rates for his services, and that it was his duty to furnish and verify the roll of electors which was to govern the returning officer.

In the statement there was no allegation that any public notice was given at the election that the defendant was ineligible, and that votes given for him would be thrown away. But in the relator's affidavit of facts accompanying his statement, he swore that before the election commenced he publicly objected that the defendant was incapacitated for

the reasons first stated, and at the close of the election protested against his return.

The summons and notice indorsed both stated it to be the object of the proceeding that the relator should be declared duly elected, as having the next largest number of votes, and the defendant being disqualified.

The learned Chief Justice decided that the defendant was ineligible, and his election invalid, but that the relator was not entitled to be returned as duly elected, as claimed by him; and he determined that there should be a new election.

The ground on which he refused to seat the relator was that his statement of objections—though it advanced a claim on his part to be returned as duly elected by reason of the defendant's being disqualified, and of his, (the relator's) having the next greatest number of votes—did not allege that notice of the relator's disqualification was publicly given at the election, so that the electors, having knowledge thereof, might have been aware that their votes for him could not be legally received.

Price shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

This case was decided by the learned Chief Justice of the Common Pleas in Chambers, and we have received from him the grounds and reasons of his judgment. The decision is complained of by the relator, and we are applied to under the 152nd clause of 12 Vic., ch. 81, to reverse or alter the judgment in certain particulars.

I think we should not entertain any new evidence as our ground for doing so, and that the judgment is properly examinable only upon what was before the judge. At least, that this should be the rule, unless there may be grounds under some very special circumstances, for an exception; if in any case such a exception can be allowed.

The statute 13 & 14 Vic., ch. 64, schedule A. No. 23, makes it lawful to issue the summons having both objects in view—that is, to oust the defendant, and to seat the relator—*upon the relator shewing by affidavit that the election of the defendant was invalid;* and I can not say, therefore, that I am prepared to hold that the statement required by our rule, which is meant to be a statement of objections, must necessarily contain a statement of whatever may be thought essential for shewing the relator's right to be returned as a consequence of declaring the election of his opponent void.

But I also think, that whether the court, or judge before whom the relator brings his case, will go further than declare the election of the

defendant void, or will proceed to seat the relator, is in some measure a matter of discretion, with which there ought to be no interference by way of appeal, at least, unless the ground for claiming the seat be so clear, under the circumstances, that it can properly be said to be a plain right. The case cited in the argument, of the *Queen* v. *Horns*, 7 A. & E. 960, is an authority to shew that in the opinion of the court in a similar case in England, notice of disqualification should be given to the electors, although there would seem strong reason for contending that the electors should be assumed to know both the fact of the person being assessor and collector, and that by law the possession of either office is a disqualification; for it is not like a disqualification for want of property, or upon some other ground which can hardly be assumed to be notorious. This difference, however, was strongly urged upon the court; and it was held notwithstanding, that in such a case, as in others, it should be shewn that the electors had notice of the disqualification.

I repeat, that I do not think that the statement, which is meant to be a notice of the specific objections on which the validity of the defendant's election is to be questioned, must necessarily contain a statement of the evidence and grounds on which the relator means to contend that, in consequence of the election of the defendant being set aside, he is entitled to be returned in his place; because that is applied for as a consequence of the expected decision against the defendant, and is not a matter in which he has any greater interest than the other inhabitants. But I do think that the learned judge before whom the case was tried had a right to be satisfied, and required indeed to be satisfied, that notice had been given of defendant's disqualification at such a time, and in such a manner, as must have made the electors aware that if they voted for that candidate, their votes would be thrown away. At the trial before the learned Chief Justice, the affidavit accompanying the statement was relied upon for proving that fact, but it did not prove it, because it might be quite consistent with the language of that affidavit that a month or a week before the election the relator had stated publicly, on some occasion unconnected with the election, and in presence of but a few or none of the electors, that this defendant was disqualified; whereas it should have been shewn that at the time of the election, and in due time, and in presence and hearing of the electors, such notice was given. The learned Chief Justice notices in his judgment the unsatisfactory nature of the proof, though perhaps he might have concluded to accept it, if he had overcome the other difficulty about the statement.

As to receiving or declining to receive additional proofs after the case came on to be heard, that must always be in a great measure discretionary; and the Chief Justice having declined to receive further affidavits on that point, and considering that on what was before him it was the safer and more fair course to the electors that there should be a new election, we discharge this rule, but not with costs.

Rule discharged.

DOE DEM. TAYLOR V. PROUDFOOT.

Accidental overplus, not covered by deeds—Ejectment for, by patentee—Statute of Limitations—Discontinuance and adverse possession.

The plaintiff, being the patentee of a 200 acre lot, sold to one T. the rear 50 acres, and afterwards "the front three quarters" to one K. Supposing that he had parted with all his land, he moved off the lot: it turned out, however, that, owing to an error in running the lines, a small surplus, not covered by the deeds, was left between the part sold; and after a lapse of more than thirty years the plaintiff brought ejectment to recover this portion.

Held, That to enable the Statute of Limitations to run, it was not necessary that K. should have taken possession, imagining that he had bought all not sold to T., and intending therefore to claim and possess the part in question; but that it should have been left to the jury to say whether the plaintiff having, been in possession of the rents and profits, had not discontinued such possession, and whether such discontinuance was not more than twenty years before action brought.

(Q. B., H. T., 15 Vic.)

This was a second trial of an action brought to recover possession of an alleged overplus between the rear fifty acres and the front three-quarters of a 200 acre lot.

At this trial, before Sullivan, J., at Toronto, it appeared, that in 1807 the Crown granted the whole lot to David Taylor, describing it as a lot containing 200 acres, more or less, and giving the length of the side lines as 100 chains, and the breadth of the lot 20 chains, adding, however, the words "more or less" to each limit.

Neither Taylor nor the other owners of lands in the neighbourhood were aware that there was any overplus in the lots, but assumed that they were 100 chains deep and 20 chains wide, until some years, probably many years, after the deeds were made by Taylor on which the question in this action arose.

Some time before 1816 Taylor first sold to one Tisdale the rear fifty acres of his lot, describing it so as to confine the portion sold to 50 acres off the rear, taking the whole width of the lot—at least, it was contended that the description could have no other effect. This deed having by mistake called the lot by the wrong number, a second deed

was made to Tisdale in 1830, describing the land by metes and bounds as in the first deed.

Then (in 1816) Taylor, who when he made his first deed to Tisdale was residing on the front of his lot and still owned all that he had not sold to Tisdale, sold "*the front three-quarters*" to one Kemp, describing that as if it were 75 chains in depth by 20 in width, which no doubt was his impression, derived from his patent.

Having thus parted, as he supposed, with all his land—for there could be no doubt that the fifty acres which he sold to Tisdale was considered by him to be the rear quarter, though his deed called it by the name of the rear part, and the land sold to Kemp being the front three-quarters—he moved off the lot, gave up his possession to Kemp, and left that part of the country entirely; and then, after an interval of thirty-four years, he brought this action to recover a small piece, which, on an accurate survey, it turned out there was between the front three-quarters sold to Kemp and since purchased by the defendant Proudfoot, and the fifty acres first sold to Tisdale, owing to the lines over-running the 100 chains mentioned in the Crown plan of survey.

The defendant objected, *first*, that the two deeds made by Taylor were evidently meant to embrace the whole lot, and that they did by a fair construction take it all in. *Secondly*, that at any rate the lessor of the plaintiff having been once in actual occupation of the lot, receiving the rents and profits, had discontinued his possession for much more than twenty years, and could not therefore now maintain this action; that he was barred by the 17th section of 4 Will. IV., ch. 1.

The small piece of land in question had been lying in a state of nature, not occupied or improved, and not claimed by either of the proprietors of the lot, until this defendant enclosed it a year or two ago.

The learned judge observed to the jury, that the discovery of the surplus was not made till long after Taylor had made both conveyances, and had removed altogether from the lot: that in his opinion the two deeds did not meet, and did not embrace the whole land; but that if Taylor left the land thinking that he had disposed of it all, and Kemp entered thinking that he was entitled to the whole residue not conveyed to Tisdale, and intending to take possession of the whole, then the Statute of Limitations would begin to run, and Taylor would be barred.

The jury found for the plaintiff.

Vankoughnet, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection.

McNab shewed cause.

ROBINSON, C. J.—As regards either the defendant Proudfoot, or

the present owner of the rear 50 acres, there would be no injustice in the plaintiff's recovery, though it seems unreasonable that he should, at this late period, seek to come in between them with his claim.

In many other instances where there has been such an overplus, contrary to the intention of the government, and unknown for many years to grantees, it would lead to extreme hardship and inconvenience if the original proprietor could make good a claim to it, after giving conveyances which he supposed at the time would have covered the whole lot; but it does not happen that in this case Taylor's being allowed to recover it would produce inconvenience, or operate unjustly towards any one. Tisdale confined his possession to the actual 50 acres in rear; and Shaw, who had purchased from him and is now in possession, claims nothing more, and has never improved or inclosed anything beyond.

The defendant Proudfoot has clearly only a right by his deed to the front three-quarters of the lot, and can pretend no just claim to this small surplus lying between that and the rear fifty acres. But he has chosen to defend for it, and he has of course a right to take any exception that he can against the plaintiff's claim to recover.

It is very unwise in the parties to be continuing a contest about two and a-half acres of unimproved land in the rear part of a lot, when either party desiring it could probably annex it to his property by an amicable compromise, at a much less expense than he must incur by a law-suit in this court, even if successful.

Being driven to determine upon the points raised, I cannot avoid saying that it appears to me the direction given to the jury was inaccurate in this, that it was stated to be a necessary part of their inquiry whether Kemp took possession of his part imagining that all had been conveyed to him which had not been sold to Tisdale, and intending therefore to claim and possess the small lot of land in question. But, in my opinion, that would be reviving the doctrine which the new Statute of Limitations was intended to put an end to, and would make the operation of the statute depend necessarily in all cases on there being for twenty years an adverse holding. I do not consider that understanding of the 17th section of 4 Will. IV., ch. 1, to be correct. The mere fact of the holder of a good paper title not having been in actual possession by himself or tenant for twenty years, has never been held by us to bar his title; because, while he holds a good title uncontested by any one—and there is no other ground for imagining that he has abandoned his interest than the mere fact that he has not resided

on and improved his land—this cannot be reckoned a discontinuing of possession within the meaning of the statute

But then, we find Taylor first selling the rear fifty acres of a lot, which there is no doubt he and all others at that time suppose to contain 200 acres, and to be 100 chains in depth, according to which supposition the rear 50 acres would be the rear quarter; and soon after this he sells the front three-quarters, and then leaves the lot altogether, no doubt considering that he had sold the whole. Now, after nearly forty years, upon a discovery made several years ago that there was a surplus in the lot, and that the descriptions did not meet, he brings this action for the purpose of gaining possession of that small surplus. In such a case, it appears to us, it should be left to the jury to say whether Taylor, having been in possession of the rents and profits, had not discontinued such possession, and whether such discontinuance of possession was not more than twenty years before action brought.

We consider that while Taylor was living on the lot, not having sold to any one, he was in actual occupation of the whole, because his title covered the whole, and it was of no consequence whether he left it part in wood or not; then if the jury should find, that intending to sell all, and supposing he had sold all, he withdrew from the possession, the Statute of Limitations must have begun to run against him from the time of his removal; or I do not know in what case and under what circumstances we can give any force or effect to the words, "when the person claiming such land shall in respect of the estate or interest claimed have been in possession, or in the receipt of the profits of such land, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right to bring an action shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession."

It seems true here that neither Tisdale nor Kemp, nor their vendees, have in the interval taken possession of the small piece of land in contest, but that does not affect the question, and no one has possessed it for twenty years; but dispossession and discontinuance of possession are not both required by the statute; the expressions are used disjunctively, and there is no doubt that it may happen in cases under the statute that one may by discontinuance have lost his right, when at the time no other person can be said to have acquired a right to the property by possession against him. That may lead to consequences perhaps not foreseen or intended by the legislature; but it is a consequence noticed by English commentators on the statute—not, however, as a circumstance which can prevent the operation of the statute as a

bar in a clear case of discontinuance of possession. It would lead to great inconvenience, if a person who has sold a lot of land in parcels could come after twenty years and claim the benefit of a few inches, or a few feet of surplus unknown to any one, and intrude himself between adjacent properties.

I think there should be a new trial without costs.

DRAPER, J.—It appears to me the verdict for the plaintiff should be set aside. The case was apparently left to the jury as in order to defeat the claim of the plaintiff's lessor; it was necessary to shew there had been a possession adverse to him for twenty years next before action brought—*i. e.*, an entry into the possession of these $2\frac{6}{16}$ acres—by some person who claimed to hold them as owner; though such entry might have been only by entering into the front three-quarters, claiming to take and hold all the land from the front to the rear fifty acres.

I do not so construe the 4 Will. IV., ch. 1, sec. 17. I take it the words "have been dispossessed," and "have discontinued," are intended and are used to represent two distinct things. The doctrine of non-adverse possession is put an end to by the statute.—*Nepean* v. *Doe dem. Knight* (2 M. & W. 893). The question is whether twenty years have elapsed since the right accrued, whatever be the nature of the defendant's possession. This question depends, under the statute, upon when the lessor of the plaintiff was dispossessed or discontinued. I take the former term to refer to the act of a third party, the latter to an act of the owner himself: and that, in order to establish a discontinuance of possession, it is not *indispensable* to shew a possession by a third party: and therefore that the jury should have been asked to decide, as a matter of fact, on the evidence of the sales to Tisdale and to Kemp, and of the lessor of the plaintiff having quitted the premises in 1814—being at that time in possession—and never having re-entered; whether the plaintiff did not in 1814 discontinue the possession, without reference to the additional enquiry whether Kemp then entered into possession of the $2\frac{6}{16}$ acres in question; and if they found such discontinuance, to give a verdict for the defendant.

We were referred to a case of *Doe Cuthbertson* v. *McGillis*, recently decided in the Common Pleas, in which this question of discontinuance was discussed. The decision in that case has not yet been reported, and I have not been able to consider it. (Now reported in 2 C. P. 124).

As at present advised, I think there should be a new trial without costs.

Per Cur.—Rule absolute for new trial without costs.

THE MARMORA FOUNDRY COMPANY v. JACKSON.
THE SAME v. MCELROY.

Action against a shareholder for calls.

By the Marmora Foundry Act, 1 W. IV., ch. 11, it is provided that the stock subscribed for "shall be due and payable to the said company" in the manner mentioned in the act; and that in case of neglect or refusal to pay the instalments due on shares, such shares shall be forfeited and sold.

Held, (in accordance with the Court of Common Pleas,) that the company were not restricted to the remedy by forfeiture;—and also, that they might maintain an action against a shareholder upon calls of stock subscribed. (Draper, J., *dissentiente.*)

(Q. B., H. T., 15 Vic.)

This was an action of the Marmora Foundry Company against the defendant, for calls made on stock subscribed for by him.

The plaintiffs sought to recover the first instalment, and also two calls of ten per cent. each, made by the directors under the act of incorporation.

The second and third counts of the declaration were demurred to; and the ground taken was, that the plaintiffs could maintain no action at common law against one of the shareholders in the company, upon calls of stock subscribed, and that no such remedy is given by the act which forms their charter, 1 W. IV., ch. 11.

McMichael for the demurrer.

Cameron, Q. C., contra.

The statutes and authorities referred to fully appear in the judgment of the court.

ROBINSON, C. J.—The question whether this company can sue a shareholder for calls has been before the Court of Common Pleas of Upper Canada in no less than three cases, where actions were brought by this same company against shareholders for calls; the declaration, however, in each of those cases being for debt, and not in assumpsit, as it is in the present case. I refer to the cases of the *Marmora Company* against *Ponton*, against *Boswell* (1 C. P. 1, *ante* p. 296), and against *Murney* (1 C. P. 175, *ante* p. 279), in all of which it was held that the company could sue in debt for calls; and in support of their opinion that court referred to the cases of *Venning* v. *Leckie*, 13 East. 7; *Bedford et al.* v. *Brutton et al.*, 1 Bing. *N. S.* 399; and *Andrews* v. *Ellison et al.*, 6 Moore 199.

It did not appear to them that there was much force in the argument founded on a comparison of the statute 4 W. IV., ch. 28, secs. 17 and 18, creating the Cobourg Railway Company, with 9 Vic., ch. 80, and 10 & 11 Vic., ch. 87, secs. 7, 8, and 9, which last mentioned statute had been relied upon in argument as amounting to a declaration that

without a special provision there can be no such action as this for calls. They observe that in the first of the Cobourg Railway Acts referred to, the provision is merely that the stock shall be "*payable by instalments*" at such times as it shall be called in; while in the act incorporating the Marmora Foundry Company it is expressly said (4 W. IV., ch. 11, sec. 4) that the amount of stock subscribed by each shareholder "*shall be due and payable to the company.*"

The Court of Common Pleas formed, on this express provision, the opinion that the company must be held entitled to sue for that which is by the act made payable to them.

In the Cobourg Railway Acts, the provision not being so express, that the stock shall be *payable to the company*, they did not regard the two acts as placing the question on the same footing. In regard to the Cobourg Railway Company, the legislature seems to have assumed that they were not in a condition to bring actions for calls. The preamble to 10 & 11 Vic., ch. 87, it must be confessed, appears to intimate that opinion pretty clearly, though the seventh and following clauses might at any rate have seemed necessary, in order to make the form of action more concise and convenient, even although the legislature had not been under the impression that actions at law would not lie for calls.

If there were nothing to stand upon but the difference in the language of the Cobourg Railway Acts and the Marmora Foundry Act in this respect, I should hesitate to look upon that as sufficient evidence to rest upon; for although the Cobourg Railway Act speaks of the instalments as "*payable*" only, without expressing to whom payable, yet we can hardly imagine anything else to be meant than "payable to the company." That seems to be clearly implied; and if an action would lie in this case, the legislature need not have doubted, I think, that an action would equally have lain in the other, although it would still have been desirable to make the special provision, which the statute 10 & 11 Vic., ch. 87, does make for facilitating such actions. However, we have here a statute providing in express terms that the stock subscribed "shall be payable to the company," and another clause giving the company power expressly to sue in all manner of actions, and for all matters and causes; and then the question is, why may they not sue upon this call as a cause of action?

If they can sue this defendant at all, notwithstanding his being a member of the company, then for the reasons given in the case of the *Consumers' Gas Company* v. *Nicolls*, in this court (7 U. C. R. 91, *ante* p. 239), I consider that they are not restricted to an action of debt, but may bring assumpsit as well.

Then, upon the main question, whether an action will lie at all, I think it is not an objection that the statute provides, as it does, for forfeiture of shares in case of non-payment, for it does not give an option merely to do that or bring an action, as the 49th section of the English act 6 and 7 W. IV., ch. 121, does, on which the case of the *Edinburgh Railway Company* v. *Hebblewhite* was decided, 6 M. & W. 707. When the remedy is not in terms restricted, in is reasonable to hold the remedy by forfeiture cumulative, rather than that it necessarily supersedes any remedy that there would otherwise have been by action. It would seem to have been the opinion of the court in the *Huddersfield Canal Company* v. *Buckley*, 7 T. R. 36, that an action would only lie for calls made while the subscriber still held his shares; but there is no difficulty on that point in this case. If there was anything in the nature of the provisions themselves respecting the forfeiture of shares, or in other parts of the act, to shew that the legislature intended that the only remedy should be by insisting on the forfeiture, then we ought to give effect to such intention; but I find nothing having that tendency: and, looking merely at the reason of the thing, if an action would lie in general for calls, I should say it ought not the less to lie because provision is made for selling the shares of defaulters. That might often be an inadequate remedy. A board of directors, confiding in a subscription list, might warrantably enter into contracts incurring a large responsibility, and it might be afterwards discovered, that by reason of unexpected difficulties, or the unlooked for competition of some rival company, the speculation was most unlikely to be profitable. If all the stockholders who might despair of the undertaking were at liberty to say, "I will pay no more—you may sell my stock," and if those shares should bring little or nothing in the market, the directors would be left without the means of meeting their engagements. In my opinion, if the defendant is liable to be sued by the company for calls, he may be sued in this form of action as well as in debt, and is not less liable because his share may be forfeited. It is true the fifth clause of the act says that in case of default the stockholder *shall* forfeit his shares, and that the shares so forfeited *shall* be sold; but these words do not, more than in other similar cases, impose a necessity for insisting on the forfeiture, and the use of a double remedy can always be restrained so that it shall not be used for obtaining a double satisfaction, to the oppression of the party.

It is reduced therefore to the single question, I think, whether in a case like this, and on such a statute, there is any impediment to a corporation suing a shareholder for calls upon his stock. In the case I

have already referred to, of the *Edinburgh Railway Company* v. *Hebblewhite*, it was assumed in argument by counsel, that in such a case there could be no action unless the statute expressly gave it, because the parties are partners. "It is an action," he says, "entirely given by statute." He does not mean only that an action in that short form would not lie without the aid of the statute, but that no action of debt would lie; and certainly, if debt would not, no other form of action would. None of the judges however assent to, or notice the remark, and it was perhaps made without much consideration. What is said by Lord Denman and Mr. Justice Patteson, in the case of the *Dundalk Western Railway Company* v. *Tapster*, 1 Q. B. R. 668, is more embarrassing; for there, in an action brought for calls against a proprietor of shares in an incorporated company, it was objected that the statute which expressly gave the remedy by action for the calls limited the action to any of the Queen's Courts of Record in Dublin. The plaintiffs' counsel contended that the action might nevertheless be brought in the Queen's Bench in England, for that the jurisdiction of the Supreme courts of Westminster Hall was not to be ousted without express words. Patteson, J., said to the counsel, "It is only by the aid of the statute that one partner can sue another. Must you not take the remedy the statute provides?" The learned counsel answered that the partnership was incorporated; to which the learned judge replied by asking, "could such a corporation sue its own members without the express provisions of the act?" The counsel observed, "There is no objection to it on principle," and then the conversation on that point dropped, and the argument went on, but upon another objection. The opposite counsel maintained that the act created a debt, and a remedy for that debt, which the plaintiffs were bound to pursue. The Court seemed satisfied on the point and stopped him, Lord C. J. Denman remarking that "the right and remedy are both created by the legislature, and the company are bound to pursue the remedy provided by it:" so the case was at once determined. The report does not shew whether the defendant was a shareholder by subscription, or by assignment from a subscriber. He was declared against as a proprietor of shares. If he merely became a proprietor by purchasing shares from a subscriber, then I should not feel that this case created any difficulty; but if he were a subscriber, and in that sense an original promiser to the company, then what is said in that case would certainly seem to militate strongly against the decision in our Court of Common Pleas, in the cases to which I have referred. But I cannot think that either of the judges in England, in the case I have cited, meant to lay

it down as an unqualified and self-evident proposition, that an aggregate corporation of this description cannot sue one of its own members without the express authority of a statute; for with respect to banks and insurance companies, and other trading corporations, such actions are of daily occurrence. The books contain numbers of such cases, and there is no technical rule which prevents it in all cases. The case of *Venning* v. *Leckie*, 13 East. 7, cited in the judgment of our Court of Common Pleas, is not perhaps strictly applicable in the present case, though it meets the objection of Mr. Justice Patteson that one partner cannot sue another. In this case the objection is rather, that as a person cannot sue himself, so this corporation, of which the defendant is a member, cannot sue the defendant. But that can by no means be stated to be a universal rule, for we see daily exceptions to it in practice. We see action brought both by corporations against individual members, and by individual members against the corporation. In *Tilson* v. *The Warwick Gas Light Company*, 4 B. & C. 962, Bayley, J., says, "Where an act of parliament casts upon a party an obligation to pay a specific sum of money to particular persons, the law then enables those persons to maintain an action of debt," and there is clear authority to shew that assumpsits will as well lie. This statute provides that the stock subscribed shall be payable at such times as the directors shall appoint, and it says expressly that it shall be "payable to the company." There can be nothing in the way but the supposed technical difficulty of a corporation in any case suing one of its own members—a difficulty which we see is not allowed in fact to prevail when the transaction is one entered into by the member on his individual account. When a bank sues one of its members on a note which it has discounted, the money goes into the partnership fund, in the profits arising out of which fund the member sued will participate; yet that does not prevent such actions being maintained. In this case the company was incorporated by the statute on its passing, and it had a corporate stock to dispose of. This defendant accepted so many shares of that stock, and for them engaged to pay the company, by the very act of subscribing, the price fixed by law. There is then a promise made by an individual to the company on his own account, as much as in the case of a promissory note made to a bank; and I see no reason or principle against sustaining an action on the promise.

Mr. Angel, in his treatise on corporations, goes much more into this subject than any English treatises. In his 15th chapter he treats it as clear that such an action as this is maintainable, for he begins by saying that "A subscription for stock in a joint stock incorporated

company is a contract, and the interest thereby acquired is a good consideration to support an action for the amount subscribed against the subscriber." He refers to Wordsworth on Joint Stock Companies, p. 317, and to 39 English Law Library, p. 85; but I find nothing there to support what he says. Indeed in England, as soon as corporations of this kind came into use, they seem to have provided expressly for bringing actions for calls, and for framing the declaration in a very compendious form; and the cases that have arisen upon points of pleading or evidence in actions brought upon such statutes. I have found no case of an action brought under other circumstances in England, nor any discussions in English books on the subject. There is no adjudication of a court that I can see clearly to be against it in a case like the present, nor any assertion to that effect in any book of authority, except in the case reported in 1 Q. B. R. 668, which may, however, have been a case in which the party sued was not a subscriber, and so not a contractor with the company, which would account for the *dictum*, and would render the authority inapplicable here. I am surprised that we find so little on the point in our books, and regret it, for it would have been satisfactory to have found a decision or precedent expressly in point. Reason, I think, is strongly in favor of it, and the decision of the Court of Common Pleas upon the same point, and in respect of the same statute, it is entitled to much weight. We ought not to overrule it unless we could see that it was certainly wrong. My inclination is altogether in favor of it, for here was on one side the corporation legally constituted, and capable of receiving the promise; on the other side a promise was made to that corporation in the manner sanctioned by law, and a good consideration for that promise; and the very nature of the thing, for the security of those dealing with the corporation, and for effecting the object of incorporation, must inevitably require that the persons subscribing should pay the money which is to compose the capital, without reference to the question how the account might stand as between the corporation and the individual member at any stage of the business; so that the reason against partners suing each other does not apply in this case: and, as to the mere technical objection that a man cannot be plaintiff and defendant on the same record, that no more applies here than in the numerous instances in which it is not allowed to be any impediment. I think the plaintiffs should have judgment on demurrer in this case and the other against McElroy.—(See *Holmes* v. *Higgins*, 1 B. & C. 74; *Neale* v. *Turton et al.*, 4 Bing. 149; *Davies* v. *Hawkins*, 3 M. & S. 488).

DRAPER, J.—I have not been able to bring myself to concur in

opinion with the rest of the court. As, however, the opinion of my learned brothers is in accordance with the unanimous judgment of the Common Pleas, I freely admit there is every reason to conclude they are right, and I must the more regret my inability to concur. Indeed, I should have been willing to let the judgment pass *sub silentio*, and have nominally acquiesced, as I shall effectually be bound by its authority, if I had not felt so strong a leaning to the opposite view. On this account I think it right to point out the difficulties which I have felt insurmountable in the way of arriving at the same result with them.

I can find no English case which determines that such an action as this is maintainable. If the reports were wholly silent on the subject, it might be inferred that the right was undisputed and undeniable, and that at common law an action for calls might be maintained by a corporation against a shareholder, without aid from the act of incorporation or deed of settlement; and in Angell & Ames on Corporations, 3rd ed. 474, it is said, "a subscription for stock in a joint stock company is a contract, and the interest thereby acquired is a good consideration to support an action for the amount subscribed against the subscriber;" and Wordsworth on Joint Stock Companies, 317, is referred to, apparently in support of the position. I have referred to Wordsworth (5th ed.), but neither there, nor anywhere else do I find a passage which can, I think, be considered as warranting the quotation. In page 387, 5th ed., Mr. Wordsworth says, that in order to facilitate the formation of such companies "it is considered desirable that such capital should be subscribed in small sums. These are instalments, or calls, required to be paid from time to time. The payment of them is enforced, either under the act of parliament or deed of settlement by which the particular company has been established. *As the authority thus given is important, both in its character and effects, it must be strictly pursued:*" thus putting the right to sue, as it seems to me, upon a contract entered into by the shareholders, ratified by act of parliament, with a specific remedy given to enforce it; or upon an express contract contained in the deed of settlement; and every decided case on the subject in England will, I think, be found to range under one of these two heads. Possibly the passage in Angell & Ames has reference only to such actions, and does not, (as I believe has been supposed) indicate an opinion of the learned writers, that an incorporated company can maintain an action for calls against a subscriber for shares of the capital or stock, exclusively on the right arising from the relation thereby created, and based on the consideration of the interest

acquired without any power to bring such an action being given by the charter or act of incorporation, beyond the usual power incident to all corporations, to sue and be sued. At page 393, Mr. Wordsworth, after referring to the liability of companies formed under the act 7 & 8 Vic., ch. 110, and banking companies formed under 7 & 8 Vic., ch. 113, as provided for in these acts, adds, "This liability in other companies depends upon the particular provisions of the act of parliament, if incorporated; or, if not, then upon the particular deed of settlement;" and again, at page 401, "actions for calls must be brought upon the statute, where a company are incorporated, or upon the deed of settlement, where that is the only instrument of regulation." In the *Dundalk Western Railway Company* v. *Tapster*, 1 Q. B. 667; 5 Jur. 699 S. C.; Patteson, J., says, "The difficulty in this case is, that *the company could not have sued a proprietor at all at common law*, and therefore it must pursue the very remedy given by the act of parliament." And Lord Denman says, "the whole is the creation of the act of parliament, *both the right to sue* and the particular form of the remedy; and therefore the remedy prescribed by the act must be pursued. *The 74th section, indeed, gives the right to sue in all the courts* for the purpose of recovering calls from subscribers." In that case the defendant had been sued as a *proprietor*, under the 75th section of the act, by which special authority was given to sue any *proprietors* in the supreme courts at Dublin; while under the 74th section *subscribers* might be sued in any of the superior courts—not limiting the suit to the Irish courts. I am unable to deduce from the foregoing language, taken from the report in the Juirst, any other conclusion than this:—that if the action against subscribers had been limited by the 74th section to the Irish courts, as it was by the 75th section, against proprietors, the same result would have followed—viz, that the action could only be brought in those courts, and not in the Queen's Bench in England. According to the report in 1 Q. B., Patteson, J., says, "It is only by aid of the statute that one partner can sue another;" and he enquires, "could such a corporation sue its own members without the express provision of the act?" The distinction suggested between a subscriber and a proprietor, meaning by the latter term one who has acquired shares by purchase and not by original subscription, cannot, I think, affect the application of what is said by Patteson, J., or weaken the conclusion which I deduce as well therefrom as from Lord Denman's judgment: that the mere relation of incorporated company and shareholder in such company, does not enable the former to maintain an action against the latter for calls; but that the power to bring such

or silver, and in some instances as to the 10 per cent. being ready as a deposit, are the following:—2 W. IV., chaps. 14 and 15; 3 W. IV., chaps. 19, 21 and 22; 3 W. IV., ch. 20, and 5 W. IV., ch. 15, in which the forfeiture for non-payment is to take place "if the directors shall so order and direct;" 4 W. IV., chaps. 28 and 32; 5 W. IV., chaps. 14, 16, 17 and 19; 6 W. IV., chaps. 5, 6, 7, 10, 11 and 12; 7 W. IV., chaps. 47. 48, 49, 52 and 55; 1 Vic., chaps. 29, 30, 31, 32 and 33; 3 Vic., ch. 33.

The larger number of these acts provide that the instalments due may be received in redemption of forfeited shares at any time before the day appointed for the sale thereof.

The following acts make the amount of the shares *due and payable* (not saying, to the company) as follows,—"ten per cent. on each share so subscribed shall be *payable to the said company*" immediately after the first election of directors, the residue by instalments as may be directed by the president and directors, 5 W. IV., ch. 18; 7 W. IV., chaps. 46, 51 and 54; 3 Vic., ch. 34; and none of these enable a shareholder to redeem a forfeited share by payment of the instalment.

The 6th W. IV., ch. 9 (the Toronto Gas Company) requires a sum to be paid down at the time of subscribing, to the person in charge of the books, to the use of the company; declaring a forfeiture on non-payment of subsequent instalments, and giving no permission to redeem shares that have become forfeited.

Most of these acts required subscription-books to be opened in different parts of the province, and limited the number of shares which might be subscribed for in the first instance, apparently assuming that the stock would be sought after: that the privilege of obtaining shares would be considered of some value; and, therefore, that the first instalment would be readily paid.

Only two of these acts call for further particular remark. One, which was pressed in argument in the Court of Common Pleas in connection with two acts passed since the union—viz., the 4th W. IV., ch. 28—the Cobourg Railway Company Act. This was altered by the 9th Vic., ch. 80, which changed the name and object of the company into the Cobourg and Rice Lake Plank Road and Ferry Company. The directors were authorised immediately after their appointment, to call upon the stockholders for an instalment of 10 per cent. on each share, and the residue of the shares was declared "to be payable by instalments" as the stockholders might determine; and on non-payment the shares were declared by the act forfeited, and the directors were to sell them —the purchaser paying the instalments due, over and above the pur-

chase money of the shares. This act was amended by the 10th & 11th Vic., ch. 87, the fifth section of which enacted that the subscribers "shall pay the sums respectively so subscribed, or such portions thereof as shall be, or shall have been from time to time called for by the directors;" and the seventh section expressly empowers the company to sue the stockholders for calls.—See also 13 & 14 Vic., ch. 134, sections 5, 6 and 7.

The other act, 3 W. IV., ch. 18, (the British America Assurance Company), required 10 per cent. to be ready for deposit at the time of subscribing, to be called for when the directors saw fit, and the remainder to be *payable* in such instalments as a majority of the shareholders might determine. The legislature did not think this conferred a power on the company to sue for calls, and by 6 W. IV., ch. 20, sec. 11, referring to the power of forfeiture contained in the former act, they enacted that in case the board of directors should think it more expedient to enforce the payment of instalments than to forfeit the shares, the company might sue for and recover such instalments. But, because (as appears to me) they were imposing a new condition on the then shareholders, the 15th section expressly authorises those shareholders who desire it to withdraw from the company, and oblige the company to refund to them whatever monies they may have paid on their shares. I cannot draw any satisfactory distinction between the words "due and payable to the company," used in the act incorporating the plaintiffs, and the language of 3 W. IV., ch. 18, by the terms of which the deposit is to be ready at the time of subscribing, "to be called for by the directors as soon as they may deem expedient," and the remainder is to be "*payable*" in instalments; and in case any stockholder neglects "*to pay the said directors*" such instalments, his shares may be forfeited. I think the whole clause makes the instalments payable to the directors, which is equivalent to making them payable to the company. In my judgment, the one imposes an obligation on the shareholders to pay the instalments as much as the other; and the act 5 W. IV., ch. 20, shews that it did not, in the judgment of the legislature, confer on the British America Assurance Company a power to sue their shareholders for calls.

There is a still greater variety of provisions in acts passed for similar purposes since the union.

In some, either a named per centage is to be paid at the time of subscribing or the first instalment is to be called in immediately after the directors are elected: the residue to be payable by instalments as the shareholders, at a general meeting, may direct. On neglect or refusal

to pay, the shares are forfeited, and may be sold for the benefit of the corporation by the directors. In most, though not in all, the directors may receive the instalments due by the defaulter before the day appointed for the sale, in redemption of the shares. The following are of this description: 4 & 5 Vic., chaps. 56, 60 and 80; 8 Vic., chaps. 88 and 95; 9 Vic., chaps. 80, 83, 84, 88, 98, 107, 108, 109 and 110.

In others, for banking companies, a named per centage is to be paid at the time of subscription, the residue by instalments as the directors may appoint. On non-payment, the shareholders are to incur a forfeiture equal to 10 per cent. on the amount of their stock; and the directors may sell sufficient shares to raise the unpaid instalment, and the amount so forfeited. The directors, or the stockholders at a general meeting, may remit the forfeiture. The shareholders are liable for double the amount of their stock; but the act contains no provision to enforce this liability. Such are 4 & 5 Vic., chaps. 97 and 98; 6 Vic., chaps. 26 and 27; 9 Vic., ch. 117.

The 4th & 5th Vic., ch. 96, (the Niagara District Bank) differs. The shares are declared by the act to be forfeited by neglect or refusal of the holders to pay instalments, and may be sold by the directors. But before the sale the directors may, notwithstanding such forfeiture, allow the defaulter to pay up all instalments due, and to retain his shares. The double liability of the shareholders is also declared; and the amount thereof beyond the first value of the stock may be called in by instalments, and on neglect or refusal to pay the corporation may bring actions.

In others, such as 10 & 11 Vic., ch. 68, (the Montreal Mining Company,) the directors are empowered to make calls, and to sue for and recover such calls, and to declare shares to be forfeited in case of non-payment, on such terms and in such way as they shall see fit by any by-law.

In others the shareholders "*are required*" to pay the amount of these shares in such manner as shall be ordered by the directors, and in case any person shall neglect or refuse to pay, the company may sue for and recover the same, with lawful interest. If the neglect or refusal continue for six months, the shareholder shall "*absolutely forfeit*" his shares, which shall be sold for the benefit of the company. But no advantage of such forfeiture shall be taken until the shares be declared forfeited at some general meeting of the stockholders; and every such forfeiture is to operate as a discharge of all actions and liability in respect of the shares. Such are 7 Vic., ch. 45; 7 Vic., ch. 63; 7 Vic., ch. 64. One of these acts says, "Every *shareholder shall*

be liable to pay the amount of calls" to the persons and at the times and places, appointed by the company.

The 4 & 5 Vic., ch. 79, enacts, that the amount of the shares "shall be due and payable as follows"—and then points out how—forfeiting the shares on neglect or refusal to pay.

The 4 & 5 Vic., ch. 57, after the general words of incorporation, authorises the shareholders at a general meeting, among other things, to vest in the directors such powers as they may think right, to manage the corporation and its business.

In some acts, again, the calls are to be made by the directors, and if any person neglect to pay at the time and place appointed, he shall forfeit a sum not exceeding five per cent. on his stock. If such neglect continue two months, he shall forfeit his shares, for the benefit of the other shareholders. No advantage is to be taken of the forfeiture, unless the shares be declared forfeited at a general meeting. Forfeiture is to be an indemnity against all suits commenced for calls against the defaulter. The subscribers are "required" to pay calls, and the company may sue for them. Such are 8 Vic., ch. 26; 9 Vic., ch. 82; 10 & 11 Vic., ch. 94.

In others the calls are to be made by the corporation, and if not paid at the day the shareholder becomes liable for interest, and may be sued for the calls and interest; and, on failure of payment with interest for three months from the day appointed for payment, the directors may declare the shares forfeited, and may sell shares enough to raise the sums due, returning the surplus, if any, to the defaulter. Such are 8 Vic., chaps. 91 and 92; 9 Vic., ch. 64.

In some of the later acts it is provided, that subscriptions for shares, whether made before or after the passing of the act of incorporation, shall be binding on the subscribers, who "shall, and they are hereby required to pay the sum by them subscribed" to the persons, and at the times and places required by the directors; and a power to sue in case of neglect or refusal is expressly given, as well as forfeiture, if the payment be delayed beyond a limited time. See 11 Vic., ch. 13; 12 Vic., chaps. 157 and 158; 13 & 14 Vic., chaps. 113, 115, 116, 117 and 132.

I have examined these and other similar acts of our own legislature, for the purpose of discovering how far they exhibit a construction of the various powers given, and words or phrases used; and as a guide, as far as they afford one, to construing the act under consideration. I think the following conclusions deducible from that examination.

1st. That by the erection of a corporation capable of contracting and

being contracted with, suing and being sued, pleading and being impleaded, answering and being answered unto, in all courts, &c., in all manner of actions, &c., the legislature have not enabled such corporation to maintain suits for calls, either for the first or any subsequent instalment of the capital stock, against any subscriber or proprietor.

2nd. That an express enactment that a per centage as a deposit *shall be ready* at the time of subscribing, but *to be called for* by the directors when they deem expedient, and that the "remainder shall be payable" by such instalments as the stockholders shall determine on, will not *per se* confer on the corporation a power to bring suits for such instalments.

3rd. That powers given to the directors to make by-laws, generally, for the management and disposition of the stock, effects, estate and business of the corporation, will not extend to enable them to bring such suits, or to pass a by-law authorising and giving effect to such suits.

4th. That where the statute expressly declares that forfeiture of the shares shall be the penalty of neglect or refusal to pay a call, and that the forfeited shares shall be sold, and the proceeds, together with the amount previously paid thereon, shall be accounted for and applied in like manner as any other funds of the corporation—and the statute requires no act or declaration of the directors or company to *complete* such forfeiture, and gives no power to *remit* it, and gives no other *express* power, which can only be exercised on the assumption that the defaulter is still to be considered a shareholder: such forfeiture must be taken to be absolute on the neglect or default taking place, and to extinguish the right to the shares, and all further liability in respect thereof to the company.—(See 13 & 14 Vic., ch. 184, secs. 5, 6. 7.)

Applying these conclusions to the statute incorporating the plaintiffs, and endeavouring to construe it in reference to them, and to the observations more particularly suggested by a consideration of the acts incorporating the British America Assurance Company, it further appears to me:

1st. That admitting the words "due and payable to the said company" to be sufficient to create a debt, the statute gives forfeiture, and that only, as the remedy; and that the company cannot assume a right to sue because the remedy by forfeiture may be inefficient.

2ndly. The forfeiture being *absolute* by the express language of the act, it would be inconsistent therewith that an action should be maintainable, which is necessarily predicated on the assumption that the party sued still continues to be a shareholder.

3rdly. That it is not necessary to hold that an action for calls is maintainable in order to give any effect to the words, "that the amount of the shares shall be due and payable to the company." Their purpose is answered by confining them to operate as a declaration that the amount of each call, when paid, is the money of the company, to whomsoever the payment, under the terms of the call, may have been made; so that the company would have a right of action against all those to whom any such calls had been paid, to recover the amount thereof.

I think judgment should be for the defendant on this demurrer.

I refer, among many others, to the following authorities, as more or less connected with the case:—*Venning* v. *Leckie*, 13 East. 7; *McMahon* v. *Upton*, 2 Sim. 473; *Hickens et al.* v. *Congreve et al.*, 4 Russell, 562; *Williams* v. *Beaumont*, 10 Bing. 260; *Lawrence* v. *Wynn*, 5 M. & W. 355; *Skinner* v. *Lambert*, 4 M. & Gr. 477; *Fyler* v. *Fyler*, 6 Jur. 479, 7 Jur. 185, S. C.; *Aylesbury R. R. Co.* v. *Mount*, 4 M. & Gr. 651; *Thames Tunnel Co.* v. *Sheldon*, 6 B. & C. 341; *Huddersfield Canal Co.* v. *Buckley*, 7 T. R. 36; *Giles* v. *Hutt*, 8 Exch. 18; *Great Northern R. R. Co.* v. *Kennedy*, 4 Exch. 417; *Miles* v. *Bough*, 3 Q. B. 845.

BURNS, J.—After much consideration of this case, in the course of which I have not been free from doubts as to the correctness of the conclusions I have arrived at, the ultimate result is, that I think the present action sustainable by the corporation for the amount of the calls upon the shares.

The first question which presents itself is, whether the provision contained in the 5th section of the charter, as to forfeiture of shares, is to be considered as the only remedy against members in default. The shares are transferable; but, by the 6th section no transfer can be made until the first instalment shall have been paid, and that instalment the act declares shall be payable to the company, immediately after the stockholders shall have elected the first body of directors. That payment, so far as regarded the amount and time of payment, the legislature disposed of, and placed no power in the company or its managers; and it was to be payable upon the perfect organization of the company by election of the managers. No perfect contract could exist between the corporation and its individual members until the subscriptions of stock reached the specified amount, and until then there could be no managers; but the election of the directors, supposing the amount to be subscribed, would perfect the contract, and there would then be a body to whom the payment could be made. If forfeiture were the only

penalty, and there were no responsibility beyond that, then any subscriber, as soon as the directors were elected, might, without paying anything or incurring any loss whatever, repudiate his shares; and thus there might be a corporation in name, with a body of directors as the managers, having legal authority to make contracts and incur responsibilities and liabilities, either in the name of the corporation or upon their own responsibility, as the case might be, without the power to obtain from its members the contribution which the members of all ordinary partnerships have against each other. If such, however, be the result in consequence of any omission in the act, or if it were intended that the forfeiture of some prospective future benefit should be a sufficient penalty, and no responsibility beyond that was contemplated, then, no matter what hardships individuals might labour under by reason of contracting with a company so situated, and no matter how much difficulty and responsibility the directors might personally incur, we should be bound to give effect to the act. I rather think the legislature seemed to have supposed that forfeiture would begin and be applicable after the first payment made, for the words of the 5th section seem to point to such a case. In that section the first payment of ten per cent. is not called an instalment, and it was to be paid immediately on the election of directors. In the 4th section the remainder of the stock, after the payment of the first ten per cent., is spoken of as to be made by instalments. If we read the two sections together, and suppose the legislature contemplated the payment of the first ten per cent. at once, and that a corporate name was given to a body of partners believing in the integrity of each other to perform what might have been naturally expected without compulsion, then we can see there would be something more than a prospective advantage to be forfeited, for where forfeiture would apply there would be at least the first payment, and in this view the words "*with the amount previously paid* thereon" would have a tangible meaning. The restriction against the transfer of the shares till after the first payment should be made supports the view that the legislature contemplated an immediate payment of the first ten per cent. This case is not against the transferee of shares, and therefore we are not called upon to say whether, as against such a one, forfeiture would be the only consequence of non-payment; but, being against the original subscriber, the question is, whether, as respects him, forfeiture was the only course to take. I am not able to see my way clear; but, upon the best judgment I can form, I think that forfeiture was not the alternative alone, but that it was intended there should be something paid upon the stock upon which forfeiture was to operate.

If this be correct, then the next question is whether an action can be upheld on this statute, either for the first payment directed to be made, or for subsequent calls of the directors, in the absence of an express power to sue the members of the corporation for payments to be made on the stock. As before remarked, the first payment was directed to be made by the legislature, and declared to be due and payable to the company immediately on the election of directors. There is much difficulty in reconciling this provision of the charter with the view that payment of that sum depended on the spontaneous act of the subscribers, subject only to the penalty of forfeiture. If the latter were intended, there seems no reason why the directors should not have been vested with the power of calling for it. I think the legislature must have intended to create a liability on those subscribers most certainly who elected the directors, and to have imposed an obligation to pay the sum mentioned in the charter to the company. Each subscriber would see, upon his undertaking in the first instance, that unless a certain amount were subscribed he did not become a holder of shares, and he would see that ten per cent. was to be due and payable upon the election of directors. These terms appear to be a mutual guarantee to each other that the company could not be formed except upon a certain amount of capital, and a certain percentage of that to be paid immediately; and therefore might be the inducement for many to enter into it who otherwise would not. The act of parliament must, as respects the members, be looked upon as the contract between themselves, and though framed by the legislature for them, yet when signed by them is as effectually binding as if the contract were framed by themselves. I do not look on the provision to pay the ten per cent. immediately as a direction or permission to the members to pay it, but it is a command creating an obligation, which each may well be supposed to have undertaken, to every other subscriber. In the case of an indenture of lease without a covenant to pay the rent, an implied covenant arises against the lessee from the words *yeilding and paying*. If the charter be considered as the agreement of the subscribers, it appears to me difficult to draw a distinction between that and the case of the lease.

The remaining consideration is, whether the provision is sufficient to allow the company to sue, in the corporate name, one of its members for stock payments. I can see no reason why each individual member should not contract with the company, as he might do with the members of an incorporated company, that he would pay a particular individual. In the latter case an action can be maintained by the

person named in the agreement; and so, on the other hand, it appears to me, if the agreement is with the corporation, an action on the agreement can be maintained by the corporation. In this case the stock is made payable to the company at a time when as a corporation it is complete. The general power to sue and be sued is given; but, independent of that, if it be true that each subscriber entered into a legal obligation to pay the company, I should say it must follow as a consequence that the right to enforce the obligation is involved with the obligation.

If there be an obligation to pay the first ten per cent., then is there a different rule of construction applicable to the other instalments? or, in other words, does the oblication cease with first payment, and does the forfeiture alone apply to the rest of the stock? I think it would be difficult to hold that the obligation to pay was intended to be restricted, or that the true construction of the contract is that its terms are restrictive, or that they are to be confined. I think the obligation must be taken to override the whole stock, and that the payments to be called for by the directors are under the same influence as the payment declared by the legislature. It was necessary that the forfeiture clause should be inserted, for that power very materially suffices to place the willing subscribers upon an equal footing with those who are tardy and unwilling. No forfeiture could take place without express provision, for no one can be deprived of his property by implication; but that is a very different question from implying an obligation to pay to a common object, in the prosperity of which all the subscribers must be supposed to have had an interest.

For these reasons, I have come to the conclusion that a legal obligation does impliedly arise upon the act in question: that the absence of an expres power to sue members does not destroy or do away with the effect of that implied obligation; and that the words of the 4th section are sufficient authority to the company to sue its members as upon a contract to pay for stock.—(See *Radenhurst* v. *Bates*, 3 Bing. 470; *Brown* v. *Tapscott*, 6 M. & W. 123; *Holmes* v. *Higgins*, 1 B. & C. 74; *Tilsen* v. *Warwick Gas Light Co.*, 4 & 5 B. & C. 926; *Carden* v. *General Cemetery Co.*, Bing. N. C. 253; *The West London Railway Co.* v. *Bernard*, 13 Law J. Q. B. 68; *Birkenhead, Lancashire & Cheshire Junction Railway Co.* v. *Brownrigg*, 19 Law J. Ex. 27; *Same Co.* v. *Cotesworth*, Ex. 14 Jur. 354; *Chapman* v. *Milvain*, 14 Jur. Ex. 251.

Per Cur.—Jugdment for plaintiffs on demurrer.

DOE DEM. DEMPSEY v. BOULTON.

9 Vic., ch. 34— Registration of judgments to bind lands—Elegit.

The meaning of the 13th section of 9 Vic., ch. 34, is, that judgments shall bind lands from the date of their registry, not with reference only to remedy by *elegit*, but for the purpose of sale under a *fi. fa.*

(Q. B., H. T., 15 Vic.)

Ejectment.—The following case was stated for the opinion of the court.

The lessors of the plaintiff claimed under a deed of bargain and sale bearing date the 20th of June, 1850, from William Botsford Jarvis, Esquire, as sheriff of the County of York.

The facts of the plaintiff's case, which were admitted by the defendant, were as follow:

That in a certain suit in the then District Court of the Home District, wherein one John Lyster was plaintiff, and Reuben Parkinson defendant, a judgment was duly entered in the said court on the 18th of March, 1848; and that such judgment was docketted in the said court on the same day: that the said judgment was duly registered in the registry office of the County of York on the 14th day of March, 1848, under provincial statute 9 Vic., ch. 34, sec. 13: that a writ of *fieri facias* against the goods and chattels of said Parkinson was duly issued, and returned *nulla bona* by the sheriff of the then Home District: that a writ of *fieri facias* against the lands and tenements of the said Reuben Parkinson was issued on the 28th of October, 1848, directed to the sheriff of the County of York, and placed in his hands on the same day; and that the said writ was returnable on the first day of December term, 1849: that said writ was returned, "lands on hand for want of buyers," and a writ of *venditioni exponas* thereupon duly issued, on the 13th of May, 1850, returnable on the first day of June term in that year, under which the lot of land was sold to the lessors of the plaintiffs, who were the highest bidders therefor: that the sale was conducted in the manner and according to the course in which such sales are made: that a deed from the sheriff of the County of York to the said lessors of the plaintiff, for the said lot of land, was made on the 20th of June, 1850: that the said lot of land was, at the time of the entry of the said judgment, and of placing the writs of *fieri facias* against the lands, and *venditioni exponas*, and the said sale, unoccupied.

The facts of defendant's case, admitted by the plaintiff, were as follow:—

That Parkinson, the execution debtor, owned the land in fee, in and previous to the year 1848: that the said Parkinson was indebted to

one Raymond, and that a negociation for the purchase of the land in question was pending between them for nearly a year previous: that in harvest time 1848 an arrangement was concluded between them, and Parkinson executed a deed in fee to said Raymond, which was not registered: that Raymond had no *direct* notice or knowledge of any judgment against Parkinson: that in the month of March, 1849, Raymond sold to the defendant, Charles Boulton, the said land for a valuable consideration, the full value thereof: that neither Raymond nor the defendants had then any knowledge of the judgment against Parkinson, or of the *fieri facias* against lands: that in order to save fees of registration, it was agreed between Raymond and the defendant should take a deed direct from Parkinson, in which case one registration would suffice: that the consideration agreed on between the defendant and Raymond was given by the defendant to Raymond; and that thereupon, at Raymond's request, Parkinson and wife (barring her dower) executed and delivered to the defendant a common deed of bargain and sale in fee for the consideration expressed of 50*l.*

This deed was dated the 12th March, 1849, and was made and delivered on that day: that the last mentioned deed was duly registered on the 14th of March in the year aforesaid (1849): that the title to the land in question was a registered title previous to the sale thereof by the sheriff: that one John Mills was patentee of the crown, and conveyed to Parkinson in the month of November, 1836, which deed was registered the 26th of January, 1849: that the sale of lands by the sheriff was forbidden on the part of the defendant.

If the court shall be of opinion that the plaintiffs are entitled to recover, then the verdict is to be entered for the plaintiffs: but if the court shall be of a contrary opinion, then a verdict is to be entered for the defendant, or a non-suit, as the court shall think fit.

Eccles for the plaintiffs.

Connor, Q. C., contra, cited *Doe McIntosh* v. *McDonell*, 4 U. C. R. (O. S.) 195.

Robinson, C. J., delivered the judgment of the court.

This case, in our opinion, is perfectly clear in favour of the plaintiffs. The English statute referred to, 3 & 4 W. & M., ch. 20, under which dockets of judgments were required to be kept, is purely negative in its provisions. For the protection of purchasers and mortgagees, it enacted, that no judgment not docketted as that act requires shall affect the lands of the debtor. Then our Registry Act, 9 Vic., ch. 34, requires that judgments shall be registered, and provides (13th clause) that the judgment, when so registered, shall affect and bind all the lands be-

longing to the defendant from the time of registration "in like manner as the docketting of judgments in England affects and binds lands." The illustration, as we had occasion to notice in a former case (*Doe dem. Dougall* v. *Fanning*, 8 U. C. R. 166. *ante* p. 377), was an unfortunate one, because at the time of this act being passed docketting had been done away with in England, and they were referring to the supposed obligation of a ceremony which no longer took place. As we have already determined in the case alluded to, we must suppose the legislature to mean that judgments registered here shall bind the land, not by relation to the time of entry of judgment, but from the time of registration, as the judgments docketted in England (when docketting was required) used to bind from the time of docketting, and not from the entry of the judgment.

Dr. Connor has argued that the reference to the English practice and authority holds us exclusively to the English mode of obtaining satisfaction from the lands of the debtor, and that the expression in our statute must be taken to mean, that as against any purchaser or mortgagee coming between the time of such registration and the placing a *fi. fa.* in the hands of the sheriff, the judgment registered here shall, from the time of registration, bind the lands only for the purpose of remedy by *elegit*, but not for the purpose of sale under a *fi. fa.* We cannot accede to this construction, but consider that the legislature meant nothing more or less than to say, that as in England judgments did not affect lands from the time of being entered, but from the time of being docketted, which first gave to third parties the means of searching for and ascertaining incumbrances, so in this country where they were requiring registry in order to give means of knowledge to third parties, the judgment should not affect the land till it has been registered.

The legislature cannot be supposed to have framed their provision with a view to process of execution by *elegit*, which they knew was never resorted to in this province, being considered to be superseded by 5 Geo. II., ch. 7, which gives the same process of execution against lands as against goods.

Postea to the plaintiff. (*a*)

(*a*) Various points arising on the construction of the statutes relating to the registration of judgments will be found treated of in the *Upper Canada Law Journal* for September, 1860. But as these statutes have been repealed by the Act 24 Vic., ch. 41, the old law may be said to have revived, as the old practice and decisions must be resorted to in all future cases.

The Queen v. Gamble & Boulton.

Privilege of members of parliament from arrest.

Members of the provincial parliament in Upper Canada have the same privilege from arrest as members of parliament in England.

One of the defendants, being a member of parliament, was arrested on the 29th of November, 1851, under an attachment issued against him as an attorney for the non-payment of a debt. The last preceding session during which he had been a member expired on the 30th of August, 1851, and that parliament was dissolved on the 6th of November following. On the 10th of December he was again elected, and in February applied to be discharged on the ground of privilege.

Held, that he was not privileged under the first election, as at the time of arrest he was not a member, and more than forty days had elapsed from the close of the last session; but that he was entitled to his discharge as a member of the new parliament, having been arrested within forty days next before the return of the writ of election.

The return at the new election was held sufficiently proved by the affidavit of applicant.

(Q. B., H. T., 15 Vic.)

M. C. Cameron obtained a rule *nisi* to set aside the arrest of W. H. Boulton, Esquire, one of the defendants in this case, upon a writ of attachment which had issued, on the ground that *at the time of the arrest* the said W. H. Boulton was privileged from arrest by reason of the privilege of parliament; and that *since the arrest* he had become entitled to the privilege of parliament, having been elected a member of the parliament of the province of Canada. He had moved to rescind the rule of court made in Michaelmas term last, ordering the attachment to issue, and to set aside the writ also; but the court refused a rule *nisi* on these matters, because the privilege, if it were a valid objection against the rule and the attachment, existed at the time the rule was pending, and was not relied upon or stated in the affidavits and papers on which it was moved.

The arrest took place on Saturday, the 29th November, 1851. The parliament was dissolved on the 6th day of that month; and the affidavit stated that Mr. Boulton was a member of that parliament; and "that the election of members for the said city," (Toronto) "as representatives thereof in the next parliament, is fixed for the ninth and tenth days of December instant;" and that he (Mr. Boulton) "is a candidate, and was put in nomination for re-election in this city, as a representative of the said city in the next parliament." The affidavit was sworn on the 2nd of December, 1851. A further affidavit, sworn on the 4th of February, 1852, showed that Mr. Boulton was elected in December, and was still detained on the writ of attachment.

Hagarty, Q. C., and *Connor, Q. C.*, shewed cause, objecting that the writ of attachment should have been moved against, not the arrest

under it, on the first ground of objection; and that if the objection of privilege was not taken to the rule ordering the writ, it was waived, and could not now be urged to the arrest under it—citing *Fowell* v. *Petre*, 5 A. & E. 818; *South Eastern Railway Company* v. *Sprot*, 11 A. & E. 167; *Turquand* v. *Hawtrey*, 9 M. & W. 727. They argued that the priviledge of freedom from arrest had never been asserted by the legislature here, nor was it an indispensably necessary privilege. That, admitting it to exist generally, it would not apply to this case, where the defendant was an attorney, and was attached for disobedience to a rule of court ordering him to pay over money to his clients, which must be looked upon as the exercise of jurisdiction *quasi* criminal, and not civil, of the court—being a punishment; and they denied, at all events, that the privilege extended after a dissolution of parliament. They referred on the general question of parliamentary privileges, to the late edtion of Hallam's Constitutional History, and the notes on the case of *Stockdale* v. *Hansard*: to *Howard* v. *Gossett*, 10 Q. B. 359, 411; *Stockdale* v. *Hansard*, 9 A. & E. 1; *Goudy* v. *Duncombe*, 1 Exch. 430; *Butcher* v. *Steuart*, 11 M. & W. 857; 2 Lev. 72; 1 Sid. 29; *Holliday* v. *Pitt*, Cas. Temp. Hardw. 28; *Executors of Skewys* v. *Chamond*, Dy. 59, *b*; 1 Bl. Com. 165; Com. Dig. Parliament D. 17; Bac. Abr. Privilege C. 4; *Rex* v. *Earl Ferres*, 1 Bur. 631; *Rex* v. *Lord Preston*, 1 Salk. 278; *Phillips* v. *Wellesley*, 1 Dowl. P. C. 9. They cited also a judgment of the Court of Queen's Bench in Montreal, as adverse to the right claimed.

Vankoughnet, Q. C., contra, insisted that the defendant had his privilege of freedom from arrest, and referred to the proclamations in the *Gazette* by which it appeared, that on the 30th of August, 1851, parliament was prorogued by his Excellency the Governor General to Wednesday, the 8th of October, 1851.

By proclamation, tested at Montreal on the 22nd of September, 1851, reciting the prorogation made on the 30th of August, to meet on the 8th of October at Toronto, the parliament was prorogued until Monday, the 17th of November, to meet at Quebec.

By proclamation, tested at Quebec the 6th of November, 1851, parliament was dissolved; and a writ of summons, tested the same day, was issued, calling the parliament to meet on Wednesday, the 24th of December, 1851, at Quebec; and writs of election were issued, tested on the some day, and returnable on the 24th of December, 1851; and by a subsequent proclamation, parliament was prorogued until the 9th of March next.

He argued that immunity from arrest was as necessary here as in England: that this very privilege is in some respect assumed by the King's Bench Act of 1822, and has been recognized in a great variety of cases decided in this court, in which it was held, that the old form of process of *capias*, though not bailable, was improper to be used in suits against members: that this was a civil right under the common law of England, and therefore was part of the law of this province under the statute 32 Geo. III., ch. 1.

He insisted that the defendant had forty days from the date of the dissolution, and was protected as a member of the former parliament; and at all events, as a member of the new parliament, he was protected. He cited *Pitt's* case, as reported in Fortescue, 159; 2 Str. 988; *Barnard* v. *Mordaunt*, 1 Lord Ken. 125. He also referred to the case of *Wadsworth et al.* v. *Boulton*, 2 Chamb. Rep. 76, *coram* McLean, J.

DRAPER, J., delivered the judgment of the court.

The privilege claimed in this case is stated by Blackstone (1 Com. 165) to be for forty days next after every prorogation, and forty days before the next appointed meeting, "which is now in effect as long as the parliament subsists, it seldom being prorogued for more than forescore days at a time." The act 12 & 13 W. III., ch. 3, after providing that suits may be commenced against peers or members of parliament in the intervals of sitting, provides (sec. 2) "that this act shall not extend to subject the person of any of the knights, citizens and burgesses of the house of commons, or any other person intituled to the privilege of parliament, to be arrested during the time of privilege." And the 11th Geo. II., ch. 24, contains a similar provision. The 10th Geo. III., ch. 50, enacts that "no action, suit, or under process or proceeding thereupon, shall at any time be impeached, stayed, or delayed by, or under colour or pretence of any privilege of parliament." The statute of 1 Jac. I., ch. 13, was passed to authorize "new executions to be sued against any which shall hereafter be delivered out of execution by privilege of parliament." And it is said in a note to the 7th edition of Bacon's Abridgment, title Privilege 6, that since that statute, no instance occurs where any person entitled to privilege, if in custody on execution, hath been delivered by any other mode than by virtue of a writ of privilege, or by a writ of *habeas corpus*, issued in obedience to a warrant under the speaker's hand, some formal process being deemed necessary to give the act its full operation, referring to 5 Parl. Hist. 113; 1 Hats, Prec. 155.

In *Pitt's* case, as reported in Ridgway, Cas. Temp. Hardw. 100, Lord Hardwicke, speaking of the statute 12 & 13 W. III., says, "it

has provided expressly against the arrest of the person of a member; so that now this privilege is become part of a public act of parliament, which we are obliged to take notice of; and it needs not to be certified to us by plea, as before the act—being then of a private nature only—though now, indeed, we cannot take notice of the person's being a member of parliament but by matter of record, which has in this case appeared to us by Mr. Pitt's return to parliament, which is the proper method," and for which he cites 1 Sid. 42; Ray. 12; Keb. 3, 13, 16, 727. It appears to me very clear, taking the law of England thus declared in connection with our own statutes referred to in argument, and the decisions of our own courts as to the process which should issue against a member of either branch of the legislature, under the act of 1822, that the privilege claimed exists, and must be allowed if a proper case is made out.

From the earliest cases down to the latest text writer, the privilege (when parliament is not sitting) seems to be founded on the giving a reasonable or convenient time for members to go home after a session, and to go from home to a meeting of parliment. What was a reasonable time was never formally decided, as regarded the commons, until the case of *Goudy* v. *Duncombe* (1 Exch. 430), which, in accordance with "the usage, the universally prevailing opinion on the subject," fixed on forty days as the time to be allowed before and after the meeting of parliament, during which the privilege continues. The case of *Goudy* v. *Duncombe* further decided, that a person elected at a general election has this privilege for forty days next before the time appointed for the meeting of the new parliament; and the defendant in that case was discharged from custody, because, having been elected on the 28th of July, 1847, under a writ of election returnable on the 21st of September, he had been arrested on the 2nd of September. In this respect the case differs from ours; for the defendant here was arrested more than forty days after the close of the last preceding session, after the dissolution, and before the new election. It is true that before the arrest the old parliament had, on the 22nd of September, been further prorogued by proclamation until the 17th November; but that parliament had been dissolved, and a new one summoned on the 9th of November. On the day of his arrest, therefore, the defendant was not a member of parliament, so that he could have no privilege for forty days preceding the next meeting; and forty days had expired from the last day of the last session, so that the privilege for the purpose of returning home had expired. In *Butcher* v. *Steuart*, 11 M. & W. 857, the defendant was arrested within forty days after the dissolution

of the parliament of which he had been a member. It does not appear by the case whether it was within forty days after the close of the last preceding session: but, in fact, parliament was dissolved the day after the close of the session, which took place on the 22nd of June, and the arrest was on the 22nd of July, 1841; so that neither of these cases go the length contended for, as to this defendant's privilege as a member of the preceding parliament. *Pitt's* case is still less an authority to this extent; for the parliament was prorogued on the 16th of April, dissolved by proclamation published on the 18th, and he was arrested on the 20th—only four days after the prorogation—and the court expressly discharged him, on the ground of privilege *redundo*.

I am not, therefore, prepared to decide, that as a member of the old parliament Mr. Boulton is entitled to his discharge.

The remaining question is, whether, having been elected to the new parliament, and arrested within forty days next before the return of the writ of election, he is entitled to be discharged? This involves the questions—1st, Of the sufficiency of the proof that he is entitled to privilege. 2nd, Of the right to be discharged if he was properly arrested.

The language of the court in *Pitt's* case, and in some of the earlier cases, might raise a doubt whether a party being taken in execution, or indeed arrested on mense process, was not bound to shew his return as a member otherwise than by his affidavit.—See Bac. Abr. *ubi supra*. But in *Goudy* v. *Duncombe*, 5 D. & L. 209, the case seems to have been rested on affidavits only; and in *Phillips* v. *Wellesley*, 1 Dowl. P. C. 9, where it was clearly recognised that a party in custody in execution was entitled to his discharge on being elected a member, the case appears to have been brought before the court on affidavits only: and the learned counsel who opposed the present application did not press this objection, or rest at all upon a denial that Mr. Boulton had been elected as stated in his affidavit. And therefore it all turns upon his right to be discharged.

As to this, it was objected that he was in custody for a contempt, under the authority of this court, exercised over him as an attorney of the court; and that the case was distinguishable from those in which the party had been arrested upon ordinary civil process. The very able argument of Mr. Beames, in *Mr. Long Wellesley's* case, 2 Russ. & M. 639, contains all the law on the subject to be found in previous cases respecting the extent to which the privilege of parliament, as to freedom from arrest, extends. The only case I have seen of a later date, referring

to the same question, is *Mr. Lechmere Charlton's* case, 2 Milne & Craig 316. The cases excepted from the privilege appear to be treason, felony, refusing to give surety of the peace, all indictable offences, forcible entries and detainers, printing and publishing seditious libels, process to enforce the *habeas corpus*, and such contempts of court as the two last cited cases shew. In *Rex* v. *Wilkes*, as reported in 2 Wils. 151, Lord Camden certainly treated libel as not amounting to a breach of the peace, but at most as having a tendency to disturb the peace; and probably this decision may have occasioned the resolution of the House of Commons in 1768 to except the printing and publishing of seditious libels from the cases to which the privilege of parliament extended. Magistrates, however, were in the habit of arresting parties for libels, before indictment found; and, though their authority to do so was brought in question after the decision of the case of *Rex* v. *Wilkes*, it was maintained by a most elaborate judgment in *Butt* v. *Conant*, 1 B. & B. 548.

But that this is not such a contempt as is excepted from the privilege claimed is clear from the words of the Lord Chancellor, in giving judgment in *Mr. Long Wellesley's* case, when he says (2 Russ. & M. 661), "To those who argue on the other side I at once make a present of almost all that Mr. Beames urged this morning, as to commitments for refusing to put in an answer, for *refusing to pay money ordered to be paid*, for resisting a decree to perform any specific act, for cutting down timber, or doing any other act in the face of an injunction, or in the face of any other order of the court. The breach of any order substantially of a civil description, and in a civil matter—that is, a matter touching the rights of real or personal property—will not entitle this court, the Court of King's Bench, the Common Bench, the Exchequer of the King, nay, not even the House of Lords itself, judging in the last resort, to attach the person of the party having privilege of parliament and disobeying such an order." And in another part of the same judgment, "Against all civil process privilege protects; but against contempt for not obeying civil process—if that contempt is in its nature or by its incidents criminal—privilege protects not; he who has privilege of parliament, in all civil matters—matters which, whatever be their form, are in substance of a civil nature, may plead it with success; but he can in no criminal matter be heard to urge such privilege" (p. 665). *Catmur* v. *Knatchbull*, 7 T. R. 448; and *Walker* v. *Lord Grosvenor*, 7 T. R. 171, illustrate the principle—both being cases of non-performance of an award made a rule of court. I cannot see the fact that Mr. Boulton is an attorney-

of this court can make any difference; for the attachment is only in the nature of a civil process to enforce a civil remedy—viz., the payment of a debt.

I have not failed to consider the judgment of the Court of Queen's Bench in Montreal, in the case of *Cuvillier* v. *Monro*, which was pressed on our attention in the argument, and in which that court held that the defendant was not entitled to his discharge from arrest on mesne process on the ground of his privilege as a member of parliament; and the following summary was given of the conclusions at which the Court had arrived—1st, That the privilege from arrest on civil process does not attach to members of the Legislative Assembly by virtue of any law, jurisprudence, or usage. 2nd, Nor by legal incident nor analogy between it and the Imperial Parliament. 3rd, It does attach on the ground of necessity, to the extent of such necessity, and not beyond. 4th, The case of the petitioner does not fall within the rule, it appearing, in another part of the judgment, that the arrest took place twenty days after one, and twenty days before the time fixed by another proclamation for the meeting of the house: but it also appearing that the defendant, at the time of his arrest, was neither going to or returning from parliament; and neither proclamation calling parliament to meet for the dispatch of business. I have no intention, and indeed it would be highly presumptuous in me to question the correctness of that decision according to the law which that court is bound to administer. Another system of jurisprudence, and other laws, govern the decisions of this court. We are bound by the law of England, where there are no enactments to the contrary, and the *lex parliamenti* is a part of that law. The latest decisions in England establish what is the convenient and necessary period during which privilege from arrest lasts; and while apart from our own statutes and judicial decisions, I see nothing in the decisions in *Beaumont* v. *Barrett et al.*, 1 Moore P. C. Ca. 59, or the more recent case of *Kielly* v. *Carson*, 7 Jur. 137, at variance with the assertion and enjoyment of this privilege by our legislature, I am confirmed in my opinion of its existence by our general adoption of the law of England, by the provision for suits against privileged parties contained in our statute of 1822, and in the statutes of Canada, 12 Vic., ch. 63, secs. 22 & 33; 13 & 14 Vic., ch. 55, sec. 96; and by the uniform decisions of our courts since the former act, and also, as I am informed, before it. There is certainly an anomaly that, in one part of the Province of Canada a different rule will prevail, as to the extent of this privilege, from that which will govern in the other. But with that we have no concern. We must administer the law as

we find it, and leave to the legislature the decision as to the propriety of changing it.

In my opinion, Mr. Boulton is entitled to be discharged as a member of the present parliament. (*a*)

IN RE MCGILL AND THE MUNICIPAL COUNCIL OF THE COUNTY OF PETERBORO'.

Quashing—Repealed by-law,

The court discharged, with costs, a rule for quashing a by-law of a district council, where it appeared that such by-law had been absolutely repealed before the 12th Vic., ch. 81.

(Q. B., H. T., 15 Vic.)

Last term (Michaelmas 1851), *Mr. Hagarty* obtained a rule *nisi* to quash a by-law of the district council of the district of Colborne, passed the 11th of November, 1842, for levying rates and assessments on land and other ratable property in the said district.

This was the same by-law which this court, in their judgment given in the case of *Doe dem. McGill* v. *Langton* (*ante* p. 524), held to be illegal and invalid, and that a sale of lands for arrear of taxes imposed by it was void, for reasons fully stated in the judgment.

Vankoughnet, Q. C., contra.

It was shewn for cause against this rule for quashing the by-law, that on the 8th of February, 1848, the by-law which is now moved against was repealed by a by-law of the Municipal Council of Peterboro', and that such repeal was absolute and without reservation.

ROBINSON, C. J., delivered the judgment of the court.

The statute 12 Vic., ch. 81, sec. 165, only gives the courts power to quash such by-laws, passed by the district councils, as were unrepealed when that act was passed. This by-law, having been repealed in 1848, was not unrepealed when the statute was passed; and it would be strange indeed if the legislature had left matters in that state, that we must quash a by-law, and make the council pay the expense of its being quashed, when it has long ago been repealed by the council itself, and has now no existence for any purpose.

Rule discharged, with costs.

(*a*) In a late case of *Henderson* v. *Dickson*, 19 U. C. Q. B. 592, it was held that a member of parliament had no privilege from arrest upon a commitment for contempt of court.

McKechnie et al. v. McKeyes.

Obstruction of water-course—Right claimed, bad for uncertainty—10 & 11 *Vic. ch.* 5.

Wherever a right to interfere with the natural course of a stream is attempted to be founded upon prescription, the exercise of such right must be shewn throughout the period (with the exception which the statute allows) to the full extent claimed.

(Q. B., H. T., 15 Vic.)

Case.—The declaration stated that the plaintiffs were lawfully possessed of a woollen-mill and manufactory, with the appurtenances, and entitled to have and enjoy a certain water-course which had been accustomed to flow, and still ought to flow, to the plaintiffs' mill, to supply the same; and that the defendant was possessed of a certain mill-dam, and certain gates, hatches and erections across a tributary stream of the said water-course, higher up than the plaintiffs' mill; yet that the defendant, intending, &c., wrongfully kept and continued the said dam, &c., for a long space of time, shut up and closed, and thereby penned back and prevented the water of the said tributary stream from flowing to the plaintiffs' mill in its accustomed course; by reason whereof, &c.

Plea.—That before and at the time of the said supposed grievances, the defendant was and is the occupier of a certain close, through which the said tributary stream runs; and that the defendant and all others, the occupiers for the time being of the said close, for the period of twenty years next before the commencement of this suit, enjoyed as of right and without interruption the right of from time to time as occasion required keeping and continuing set up and closed certain mill-dams, &c., across the said stream, and thereby penning back the water to such extent and for such time as was necessary to enable the said occupiers for the time being to use a mill upon the said close: and the defendant says that at the said time when, &c., it became and was necessary, for the purpose of using a mill upon the said close, to obstruct the water by closing up the said dam; wherefore the defendant, at the said times when, &c., did keep and continue set up and closed the said mill-dam, and thereby necessarily penned back and stopped the said water for such extent and time as was necessary for the purpose of making full and proper use of the said mill, and no greater, as he lawfully might; *quæ sunt eadem*, &c.

Special demurrer, assigning for causes, that the right claimed is not alleged with sufficient certainty: that the defendant should have stated and shewed the height, dimensions, or other certain description, of the dams, hatches, gates and erections, whereby he claims to obstruct the

natural flow of said stream: that the allegation that the defendant and all others, the said occupiers, &c., had a right to stop the water to such an extent, and for such a time as was necessary to work a mill on the said close, is insufficient and uncertain, unless the defendant had somewhere stated in his said plea, either that the quantities of water or period of such stoppages were equally extensive or of equal frequency and duration throughout the said twenty years, or that there was not a greater necessity at the said times when, &c., for a more extensive supply of water to the defendant's mill than theretofore enjoyed: also, that a traverse of the said right would raise an immaterial issue—namely, as to whether the quantity of water which each of such occupiers required for the use of his mill was necessary at the time being or not—and such issue would not raise the question as to a continuous usuer for the period of twenty years to the same extent; and that the said plea does not offer as a defence a right claimed by a continuous user of twenty years, to the same extent throughout; but the said alleged right is made to depend on the wants of the occupiers for the time being, which may or may not have been continuous and consistent; and if not, then there would be no user or right in respect thereof beyond the minimum: also, that it is not alleged with sufficient certainty, that the defendant, or any other occupiers of the said close, held and enjoyed a mill on the said close throughout the said twenty years; nor that such mill, nor any mill, was in existence during that time; nor that the defendants, or any other the occupiers, were entitled to the right claimed by reason of the occupation of such close, or while they occupied such close, or by reason of the possession of such mill; and that it is not averred that the defendants committed the acts complained of as of right; also, that the said plea is an argumentative denial of the right claimed in the declaration, to have a regular flow of the water at all times; and that it is not a good plea in confession and avoidance, because no colour is given.

Cameron, Q. C., for the demurrer, cited *Embrey et al* v. *Owen*, 20 L. J. Ex. 212.

Vankoughnet, Q. C., contra, cited *Lawrence* v. *The Great Northern Railway Company*, 15 Jur. 653; *Ward* v. *Robins*, 14 M. & W. 237.

ROBINSON, C. J., delivered the judgment of the court.

The defendant's counsel on the argument seemed to think that this plea was not sustainable, and we think it clear that it does not shew a good defence, for the reasons stated in the demurrer.

Whatever may be the real or apparent difficulty of distinguishing this case from *Ward* v. *Robins*, 15 M. & W. 237, we take it to be

settled, that any one claiming to interfere with the natural right of another to have a stream of water flow in its usual course through his land must shew a foundation for his claim, either by grant, or by actual uninterrupted user and enjoyment for 20 years, to the full extent of the privilege which he claims. This plea certainly sets up neither defence, but is grounded on the assertion of a right which has been slumbering, and, for all that appears, never before exercised to the present extent, if to any extent, and of which, if advanced as a mere right, not acquired by actual user, the origin is not shewn. If this plea could be held good, then it must follow that the proprietor of land on a stream might say, that although he had never before dammed up the water to a greater height than five feet, yet that he had in fact always dammed it up as much as he wished, or had occasion to do, for that it had hitherto been his desire to have it only that height, but that he had lately put up a dam ten feet high because he then desired to have one that height; and that this was only an exercise of the same right he had enjoyed for twenty years, to have it of whatever height he pleased. Such a plea is neither founded on a grant, nor on user.

The decision in *Ward* v. *Robins* turned on a point wholly irrevelent to the question raised here—a singular difficulty, created by an inaccurate provision in the late English prescription act, and which might equally apply in a similar case under our own statute 10 & 11 Vic. ch. 5, for the language of both is the same, directing, or rather allowing, the period of twenty years to be reckoned down to the bringing of the action, and not to the committing of the injury which is attempted to be justified by the long user. The court held there, that in consequence of those words in the statute, the plea setting up a right as existing only at the time of action brought was not equivalent to a denial of the right which the plaintiff had asserted, and so was not an argumentative plea. But the right which the plaintiff was asserting in that case was not to have the water flow in its natural course, but the right to keep up a weir which obstructed it, and such a right he could only have by grant or long user. It seems, therefore, to have been conceded by the court that the plea was good, which asserted a right in the defendant to lower the weir to any extent he found necessary for irrigating his land; because that was a denial of the plaintiff having acquired the peculiar privilege which he claimed, to the extent which he had asserted; and the level to which the weir must be reduced in order to let in water to irrigate the adjoining close must, in the nature of things, be uniform. We have no doubt that the plea in this case is bad.

Judgment for the plaintiffs on demurrer.

The Canada Company v. The Municipal Council of the County of Oxford.

By-law repealed and revised—No sum limited—Quashed.

A District Council passed a by-law imposing a tax on certain lands, but limiting no sum to be raised. By two subsequent by-laws this was repealed and again revived.

Held, that the last by-law must be quashed, notwithstanding that the applicants had paid part of the tax imposed by the first.

(Q. B., H. T., 15 Vic.)

Cameron, Q. C., moved to quash certain by-laws, on the ground that no specified sum is limited to be raised by such by-laws: that they impose a rate to be levied *annually*, and not for any one year only: that the purposes for which the money is to be raised are undefined, and that the district councils had no power to impose a rate for the general purposes of the district.

On the 12th, August 1842 the District Council of the District of Brock passed a by-law "for imposing a tax of *one penny farthing per acre* annually on all lands within the district of Brock, for the general purposes of the district, and for other purposes therein named."

This by-law was passed under the authority of the statute 4 & 5 Vic. ch. 10.

It enacted that there should be raised and levied annually for the general purposes of the district, a sum equal in amount to one penny farthing an acre on all lands within the District of Brock liable to assessment; and that all lands within the said district so liable to be assessed should be assessed at 1¼*d* per acre annually, for the general purposes of the district; and that the same should be raised, collected, and levied in the same manner as rates and assessments had theretofore been raised, levied and collected: *provided* that this tax of 1¼*d*. an acre shall not be construed to include the tax of one penny in the pound theretofore levied by the justices of the peace on other assessable property exclusive of lands, which shall continue to be levied and collected on all assessable property except lands: *provided* also, that this by-law shall not affect the levying of the taxes theretofore levied by the justices of the peace for the erection of the gaol and court house in the district of Brock, and for the Lunatic Asylum.

On the 12th of February, 1846, a by-law was passed, simply repealing the above law; and, on the 12th of August, 1846, the District Council of the District of Brock passed a by-law "to revive in part a by-law repealed by the first by-law passed in the year 1846" (meaning the by-law last above mentioned). This by-law of the 12th of August, 1846,

recited, that it was necessary and expedient "to revive in part a by-law by the repealing of a by-law thereinafter mentioned, and in which no provision was made for collecting arrearages due by absentee land-holders, thereby committing injustice to resident rate-payers and to those who have paid their taxes regularly; and thus holding out an inducement to non-residents to evade the tax;" and it enacted that the above by-law, passed on the 12th of February, 1846, repealing the first by-law of the 12th of August, 1842, "shall be, and the same is hereby repealed: *provided* nevertheless, that the by-law repealed by the said by-law shall remain repealed so far as the imposition of taxes is concerned, and shall not be construed to revive any portions of the said by-law other than that enabling the treasurer to collect the arrearages due by the said imposition."

2ndly, That the treasurer is thereby authorized to collect all arrearages of taxes due under the authority of the said by-law in the same manner as if the same had never been repealed.

The by-law of the 12th of August, 1842, was described in the rule as having been passed on the 12th of February in that year.

Read shewed cause, and cited *The Queen* v. *Preston*, 20 L. J. (Q. B. 17.)

On the part of the defendants an affidavit was filed, that no such by-law as that first set out was passed by the district council in *February*, 1842. It seemed that by mistake the county clerk of Oxford in certifying the copy of the by-law referred to, for the purposes of this application, described it as having been passed on the 12*th of February*, 1842, when it should have been described as passed on the 12th of August, 1842. They filed another affidavit of the treasurer of the county of Oxford, that he was treasurer of the district council in 1842, and continued to be such treasurer up to and in 1849, and from thence hitherto: that on the 10th of January 1849, the agent of the Canada Company paid to him as treasurer £102 2*s*. 0½*d*., being the municipal tax of 1½*d*. per acre raised under and by virtue of a by-law passed on the 12th of August 1842, on lands belonging to the Canada Company, after deducting thereout the 1*d*. in the pound levied under the Statute of Upper Canada 59 Geo. III., ch. 7; and that when such payment was made the Canada Company was fully aware of the existence of the said by-law passed on the 12th of August 1842.

ROBINSON, C. J., delivered the judgment of the court.

There is no doubt that the by-law of 1852 was illegal, because it limited no amount to be raised, and so was directly repugnant to the 41st clause of 4 & 5 Vic., ch. 10, and was therefore void and of no

effect, according to the express enactment in the 47th clause of the same statute; and on other grounds that by-law was illegal. Then the district council repealed it in 1846; but soon afterwards reflecting that though the imposition of further rates under it had ceased with its repeal, yet the council had thereby lost the means of enforcing payment of rates accrued under it was in force, and so those who had paid in obedience to it, and those who had refused or neglected to do so, were on unequal terms, they restored it to force so far as was necessary for collecting arrears, by their by-law of the 12th of August, 1846.

This by-law is moved against, and we think we have no discretion to decline quashing it, for it is passed to enforce an illegal by-law, and cannot therefore be in itself legal. As to the answer, that the Canada Company has submitted to the by-law, and so has no motive for now applying against it, the affidavit does not go so far as to shew that all the taxes have been paid by them that they would be liable to, under it, but only that they have paid 101*l.* for rates on several thousand acres. This may yet leave further payments to be claimed.

Per Cur.—Rule absolute.

TYLEE V. MUNICIPAL COUNCIL OF THE COUNTY OF WATERLOO.

By-laws passed to impose rates, under 4 & 5 Vic. ch. 10 & 12 Vic. ch. 81—Quashed.

By-law quashed:—1. As contrary to the 4 & 5 Vic. ch. 10, in not limiting the sum to be raised, and in imposing a tax on wild lands alone: 2. As exceeding the authority given to the district councils by the 48 section of that act: 3. As inconsistent with the requirement of 12 Vic. ch. 81, in not specifying the sum required, or the purpose to which it was to be applied. [And *semble* that it is necessary under this act (sec. 41, subsec. 22), as it was under 4 & 5 Vic. ch. 10, that the sum to be raised should be specified in the by-law, and then a rate authorised for raising it]: 4. For taxing certain townships for specified sums, without shewing for what purpose the money was required.

(Q. B., H. T., 15 Vic.)

Cameron, Q. C., moved to quash the following by-laws:

1. A by-law passed by the district council of Wellington, on the 12th of August, 1842, intituled "a by-law to equalize the tax on all lands."

It recited the assessment act, 59 Geo. III. ch. 7, rating cultivated lands at 20*s.* per acre, and uncultivated land at 4*s.* per acre, being equal to one penny per acre on the first, and one-fifth of a penny on the second, and enacted "that there be raised for the current expenses of the district a sum of money equal to four-fifths of a penny per acre per annum on all uncultivated land within the district, not exempted by statute,

in addition to the tax at present in force on the said lands;" and that such four-fifths of a penny per acre should be raised, &c., in the same manner as rates and assessments had theretofore been raised, collected and levied.

2. A by-law passed by the district council of the district of Wellington, on the 9th of October, 1849, intituled "by-law to raise a sum of money in several townships in this district, for the improvements therein."

It enacted, under authority of 4 & 5 Vic. ch. 10, and 9 Vic. ch, 40, that the townships of Waterloo, Eramosa, Nichol, Arthur, Normanby, Egremont, Bentinck, Glenelg, Sullivan, Holland, Derby, Sydenham, Puslinch, Wilmot, Wellesley, and Mornington, be assessed the sum of one farthing in the pound; and that the township of Woolwich, and the united townships of Peel and Marlborough, be assessed the sum of one half-penny in the pound; and the town and township of Guelph three farthings in the pound; and that out of the money arising from the said assessment 50*l* should be appropriated towards the erection of the grammer school in Guelph; and that the monies arising from the said assessment be at the disposal of the councillors for the several townships in which such monies are raised, for the purpose of paying for improvements contracted for and not finished, or completed and not paid for, and that the balance should be at the disposal of the future township councils, and subject to their order; and that out of the proceeds of the assessments the townships of Arthur, Normanby, Bentinck, Glenelg, Holland, Sullivan, Egremont, Derby, and Sydenham, should pay the sum of 40*l*. towards the erection of the Maitland bridge, and that the said 40*l*. should be paid by those townships in proportion to the amount of their assessments.

3. A by-law passed on the 31st of January, 1850, by the municipal council of Waterloo, intituled "by-law to impose a tax on the ratable property of the county, to meet the current expenses of the county for the year ending the 31st of December, 1850."

This enacted that 1*d*. in the pound should be levied on the whole ratable property in the county liable to assessment according to any law in force. The 2nd clause provided for the method of taking assessment (not objected to).

Other objects were provided for in succeeding clauses.

4. A by-law of the Municipal Council of the County of Waterloo, passed on the 4th of June, 1851, intituled "By-law to impose a tax on the ratable property of the County of Waterloo, to meet the current expenses of the county for the year ending on the 31st of December, 1851."

This enacted (under authority of 12 Vic. ch. 81) that the following sums should be levied and collected in the undermentioned townships and incorporated villages, viz :—

In the township of Arthur	£34
In the township of Bentinck	22
In the incorporated town of Guelph	153

and so on, enumerating twenty-four different localities, and assigning to each a certain sum, ranging from 6*l.* for the township of Melancthon to 521*l.* for the township of Waterloo: and that these sums respectively should be levied and collected in the different municipalities, in accordance with the act 13 & 14 Vic. ch. 67.

Wilson, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The by-law of the 12th of August, 1842, is repugnant to the statute 4 & 5 Vic. ch. 10, under the authority of which it was passed, for it specifies no sum to be raised *by a rate*, but begins by imposing a rate on all lands in addition to the existing rate; not for the purpose of making up any sum appropriated to any purpose, nor limited to any time; and it selects wild lands alone as the object of taxation, whereas, where any tax could be imposed under that statute upon lands specifically, it was required to be imposed on *all lands within the district*. We are of opinion that the rule for quashing this by-law must be made absolute.

The by-law passed on the 9th of October, 1849, is, in my opinion, clearly illegal and void, as being repugnant to the statute 4 & 5 Vic., ch. 10, in not limiting a sum in the by-law to be raised and then fixing a rate for paying it, but in simply imposing a rate without specifying what amount it is intended to cover. It is bad also, I think, for other reasons stated by the applicant. The 48th section of 4 & 5 Vic., ch. 10, authorised no such legislation. It only allowed the councils first to direct some public work to be performed at the expense of a township, next to estimate its cost and direct the amount to be raised, then to impose a rate for raising it. This by-law authorizes a rate per pound without limiting any sum to be raised, and groups the townships together in such a manner as to shew clearly that they could not have been passing the by-law for any such specific purpose, arising within any one township, as was contemplated in the 48th clause, but for the creation of a revenue to be applied to purposes which are not specified as having been authorized by the district council, but which would seem rather to have been authorized in some other manner, by the singular

provision, not consistent with the law, which places the money at the disposal of the individual councillors serving for the respective townships. We are of opinion that the rule must be made absolute for quashing this by-law.

As to the by-law of the 31st of January 1850, we are of opinion that it is void, when examined in connection with the statute 12 Vic., ch. 81, under which it was passed, as it most undoubtedly would have been under the former act; for in its enacting part it gives no information whatever of the purpose for which the money is required, nor of the sum required, nor does it make any application of the money to be raised. It is not a sufficient remedy for all these capital defects, that in the title to the by-law it is stated that the tax is to be imposed for meeting the current expenses of the year 1850. It merely imposes a tax, and then leaves the matter. It appears to me that it is still necessary (though the present act does not in express terms require it, as the 4 & 5 Vic. did) that a certain sum to be raised should be specified in the by-law, and then the rate authorized for raising it; but it is not necessary to determine that, for this by-law is otherwise bad. I am inclined, however, to think that this is the sound construction of the 22nd head of the 41st clause of 12 Vic. ch. 81. The rule must be made absolute for quashing so much of the by-law as imposes the rate and all that relates to it.

The last of the by-laws moved against is that of the 14th June, 1851, which is clearly illegal; for by it the county council assumes to rate certain townships for certain sums, without specifying in the body of the by-law for what purpose the money is required, or authorizing its appropriation to any purpose. Such a mode of taxing is clearly unauthorized by law. For any general purpose of the county, all the ratable property in the county must be assessed ratably, whether in one township or another. If the council had a discretion to tax in this manner, they might make one township contribute 5*l.*, and another 500*l*, to the same county objects, even where there was no inequality in the population and wealth of the townships. It imposes no rate per pound, nor directs an equal rate to be assessed.

The rule must must be made absolute for quashing this by-law.

By-laws quashed.

TYLEE v. MUNICIPAL COUNCIL OF THE COUNTY OF WATERLOO.

By-laws passed under 4 & 5 Vic. ch. 10—Necessity for statement of the purpose for which money required—Land need not be separately charged, or taxed by the acre.

A by-law passed under 4 & 5 Vic., ch. 10, for raising a rate, stated that the money was required to pay off 1500*l.* due to the Gore Bank, and 500*l.* due by the District to A. D. *Held*, sufficient, and that it was not necessary to state for what services the money was due, for the court would intend that the debts were legally contracted and for a legal purpose.

Under the above statute, land must have been taxed at so much in the pound on its assessed value; and it was not necessary that a by-law should charge upon land separately a distinct proportion of the sum authorized to be levied.

(Q. B., E. T., 15 Vic.)

In this case, *Cameron*, *Q. C.*, moved to quash several by-laws last term; and the application was disposed of so far as regarded four of the by-laws, two being reserved for further consideration (ante page, 572).

The first of these was a by-law passed by the District Council of the district of Wellington, under the statute 4 & 5 Vic. ch. 10. It was passed on the 12th of August, 1846, and was entitled, "A by-law to assess the district of Wellington one half-penny in the pound, to pay off two debentures held by William Allan, for erecting the court house in said district."

It recited that these debentures were due, and that it was necessary they should be paid off; and it enacted, "that the district of Wellington be assessed one half-penny in the pound, to be appropriated towards the liquidating these debentures; the one being for 850*l.*, and the other for 242*l.* 1*s.* 3*d.*;" and "that the rate of an half-penny in the pound shall be assessed on all ratable property in the district, in the same manner as other rates are levied and collected."

It was objected to this by-law, first, that the particulars of the debt for which the debentures were issued should have been stated, in order that it might be seen for what public charges or services the debt was contracted; secondly, that it should have been appointed in the law what portion of the money should be charged on the lands in the county, and that a certain rate per acre should have been imposed on the lands, in order to make up such proportion.

The other by-law was passed, also by the District Council, on the 9th of October, 1849, under the former statute 4 & 5 Vic. ch. 10. It was entitled, "By-law to assess the several townships in the Wellington district the sum of one penny in the pound on all ratable property in the said district, for the purpose of liquidating the sum of 1500*l.* due to the Gore Bank, and 500*l.* due by the district to Alexander Drysdale, Esquire;" and it enacted that "one penny in the pound shall be raised

on all ratable property in the district, for the purposes aforesaid, to be levied as other rates."

The objections urged against this by-law were, that it did not state for what services the debts were incurred for which the debentures were given, nor even state that they were for sums due by the district; and that the lands should have been charged with a certain part of the sum to be levied, and should have been rated in a sum per acre to pay such amount, and not made indiscriminately subject with other property to a rate in the pound.

Wilson, Q. C., for the defendants.

ROBINSON, C. J., delivered the judgment of the court.

In regard to the by-law of the 12th of August 1846, the nature of the service for which the debentures were intended to provide is stated —namely, to meet the charge for erecting the court house: that objection therefore fails. And as to the similar objection taken to the by-law of the 9th of October 1849, the by-law is so far specific that it states the debts and their respective amounts, so that they can without difficulty be traced. It is true that it does not shew for what public service the debts were incurred. It would be more regular and satisfactory to make that appear on the face of the by-law; but we are of opinion that we cannot properly hold the by-law to be illegal because it does not give that information: we should support it by every reasonable intendment. One of the debentures is stated to be for a debt due by the district to the person named; and though the other debenture is stated to be for 1,500*l.* due to the Gore Bank, without expressly adding by whom it was due, yet we must intend it to be by the district which gave the debenture, when nothing to the contrary appears; and this by-law, we think, sufficiently complies with the requisites of the statute, for it states the amount to be raised, and shews that it is to pay debts due by the district on debentures. We will intend that the debts were legally contracted, and for a legal purpose; for it is a clear principle of law that a by-law need not shew on the face of it all the facts that are necessary to prove it to be valid. We are not to scrutinize them as if they were special pleas. When we can see on the face of them that they are illegal, as being repugnant to the statute or otherwise contrary to law, we must notice the objection and give effect to it: but it is not indispensable that everything should appear on the face of them which is necessary to make them legal. Then, as to the remaining objection, which is common to both these by-laws: I do not consider that a by-law passed under the authority of the statute 4 & 5 Vic. ch. 10, must necessarily charge upon land

separately a distinct proportion of the sum which it authorizes to be levied. That is not required by the 41st clause of that statute, but is only permitted, if the council shall think it desirable in any case to do so. There is nothing mandatory on the council to tax lands in a greater or less degree than other ratable property; they may if they please allow, as they have done in this case, all descriptions of ratable property to contribute in equal proportion, according to its assessed value. And I also think that there was nothing in the statute 4 & 5 Vic. ch. 10, or in any other statute, which prevented lands from being rated as they had before been, and as all other property was rated when this by-law was passed—that is, according to a certain sum in the pound on the assessed value. There is nothing to make this illegal, and to require that land when rated either separately or with other property, shall be rated by the acre and not by the pound. The Council were only required to take care that all the rates which they charged upon it during the year should never exceed in the whole a penny half-penny per acre.

It was urged on the argument that it must follow as a consequence of the 41st clause of the act, that land must thenceforward be rated by the acre, and not by the pound, for that otherwise the effect of the rating would operate unequally and absurdly, on account of the different valuations placed by the then existing law on cultivated and uncultivated land. If the passing of the 41st clause had made a modification of that kind necessary in the manner of rating, it was for the legislature to alter the law. We could hardly take that liberty in a matter of so delicate a nature as taxation. But I do not see the ground for assuming the former method of rating to be wholly irreconcileable with everything contained in the statute 4 & 5 Vic. There is nothing impracticable in the case. Whether the objection would be reasonable or not, is not for us to consider. If the legislature had charged in this by-law 500*l.* of the sum upon the land, as they might have done, they must, I think, have imposed a rate in the pound for producing it—for instance, a penny in the pound; and in that case the effect would have been to tax the cleared land a penny per acre, and the uncleared one-fifth of a penny. If when all the charges upon lands for the year came to be added up, it were found that cleared lands had been already rated to such an extent as to amount to one penny half-penny per acre, then the power to impose further taxes on cleared lands would cease, while the uncleared lands might still be taxed for further amounts, until they had been made to contribute as much as the cleared lands—that is one penny half-penny per acre. But I cannot say that

the legislature did not mean that; they might possibly mean that the man who had been at the expense of clearing his land, which is a public benefit, should not on that account be taxed more on it by the acre than others might be made to pay in respect to their wild land, on which they had expended nothing. Up to the one penny half-penny per acre, they might be made to contribute in the proportions fixed by law; but each would be liable to pay taxes in all that would amount to one penny half-penny per acre, and nothing more, *Doe McGill* v. *Langton*, ante 524.

We see no sufficient ground for quashing either of these two by-laws, and therefore discharge the rules with costs.

This last question cannot be raised in regard to any by-laws passed since the new Assessment Act came into force, nor indeed since the repeal of the 4 & 5 Vic. ch. 10.

Rule discharged.

HARNDEN v. PROCTOR.

Common carriers by water—Exception against dangers of navigation.

Where an exception against loss by dangers of navigation is contained in a bill of lading, and the vessel is in fact lost in a storm, the evidence of negligence or improper conduct must be very clear in order to make the ship owner liable; and although it lies upon the defendant in the first place to bring himself within the exception, yet this is sufficiently done by shewing a shipwreck from stress of weather; and the plaintiff is then called upon to establish that the loss would not have happened but from negligence or want of skill.

(Q. B., E. T., 15 Vic.)

The plaintiff declared in case against the defendant as a common carrier by water, from Oswego in the state of New York to Newcastle in Upper Canada.

In his first count he charged that, on the 6th of December, 1850, he delivered certain goods to the defendant to be carried from Oswego to Newcastle, *to be delivered by the defendant within a reasonable time*, for a certain reward, &c. &c.: that the defendant, neglecting his duty, did not safely and securely carry the goods, but so negligently conducted himself that the goods were wholly lost to the plaintiff.

In the second count the plaintiff charged that the defendant received the goods to be carried and delivered within a reasonable time, the dangers of the navigation only excepted; and he averred that no danger of the sea prevented the safe carriage or delivery of the goods, but that the defendant so carelessly, negligently and improperly conducted himself, that, for want of due care in the defendant and his servants, they became wholly lost to the plaintiff.

In a third count it was declared that the plaintiff, on the 6th of December, 1850, being at Oswego, and being desirous of having the said goods delivered for him at the port of Newcastle, in Upper Canada, applied to the captain of the defendant's vessel "the Malta," which was then at Oswego for the purpose of procuring a cargo, to carry the plaintiff's goods from thence to Newcastle: that the plaintiff, having heard that it was the intention of the captain to take on board a large quantity of plaster stone to be carried to Newcastle, was unwilling to deliver the goods to be carried if the plaster stone was to form part of the cargo, and would not have consented to it: that he therefore inquired of the captain whether he intended to make such plaster-stone a part of the cargo, and that the captain, then, fraudulently intending to deceive him, falsely and fradulently represented to the plaintiff that the stone should not form a part of the cargo in the said voyage:" that the plaintiff was induced by such fraudulent representation to permit his goods to be carried in the said vessel, and contracted with the captain to carry and convey the same; that the captain, nevertheless, without the knowledge of the plaintiff, and contrary to his own representations, took on board 80 tons of the said stone: and that soon after the vessel sailed by reason of the large quantity of stone being on board, she sprang a leak; and in order to save the vessel and the crew, the captain ran her on shore near the mouth of the Genesee river in the state of New York; by reason whereof the plaintiff's goods became damaged and spoiled and were wholly lost.

A count in trover was added.

The defendant pleaded—1st. Denying the delivery of the goods to him in the first count mentioned, for the purpose and in the manner and form, &c.

2ndly. To the third count—that it was not represented to the plaintiff by the captain of the vessel that the stone should not or would not form a part of the cargo, as in that count alleged.

3rd. To the whole declaration—not guilty.

Verdict for the defendant.

Vankoughnet, Q. C., obtained a rule nisi for a new trial on the law and evidence, and for misdirection. He cited *Lyons et al* v. *Mells*, 5 East. 428; *Dale* v. *Hall*, 1 Wils. 281; *Pickford et al* v. *The Grand Junction Railway Company*, 12 M. & W. 766; *Carque* v. *The London and Brighton Railway Company*, 5 Q. B. 747.

Hector shewed cause, and cited *Coggs* v. *Barnard*, Ld Raym. 909; 1 Smith's Lea. Ca. 82. S. C.; *Amies* v. *Stevens*, 1 Str. 128; *Muddle* v. *Stride et al.*, 9 C. & P. 380.

The facts of the case are fully stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

At the trial the plaintiff endeavoured to prove that he had made it an express stipulation with the captain that he would not take the plaster stone on board, and that the captain violated this understanding with him. The witness on whose testimony he relied stated that he and the plaintiff went to the vessel while she was lying at the dock in Oswego, and inquired of the captain what he was intending to take over to Newcastle on that trip, to which the captain answered that he had intended to take some plaster-stone, but had made up his mind not to take it. This witness had 150 barrels of salt which he wished to send, and the captain said he would take it; and the plaintiff told him he had some merchandize and furniture to send which he would also have put on board. The captain agreed to take these also, explaining to them that his reason for not taking the stone was, that there were charges upon it at Oswego which they required him to pay before taking it on board, and that he declined doing so. All that the plaintiff desired to send did not exceed about three tons. Two or three days elapsed while the captain was discharging a cargo he had taken to Oswego. In this interval the plaintiff had gone home, leaving it with the person who had accompanied him to the vessel, and was by occupation a forwarder at Oswego, to ship his goods when the time came. In the interval the person in whose charge the stone-plaster was had received a letter insisting on his sending it over; and, the difficulty about the charges being overcome, when the forwarder went to see about shipping his salt and the plaintiff's goods, he was told by the captain that the agent having paid the charges on the plaster he must now take it over, and could not therefore carry his 150 barrels of salt; but that he had kept room for the plaintiff's goods, and would take them on board as soon as he had shipped the plaster. The witness swore that the plaintiff's goods were warehoused with him, and that he shipped them in the usual course of his business—considering that the plaintiff had himself contracted with the captain, and that he had no discretion to withhold the goods. He swore that the mate remarked that there were 15 tons too much cargo on board, but the captain said there was no danger. The vessel was so laden, this witness said, that if it had depended on him he would not have shipped his goods by her.

The captain swore positively that no stipulation was required of him not to take the plaster, nor any condition of the kind made with him; but they merely came to him and enquired whether he had a lead engaged, and that he explained to them how matters stood with respect

to this plaster, which, on account of their expecting him to pay the charge upon it, he had declined taking, and would therefore have room for the salt spoken of, and for 150 barrels more, which another person had asked him to take, and also for the plaintiff's goods. He declared that he merely stated how he was situated in regard to cargo in answer to their question. When the charges which had occasioned the difficulty were paid, he felt himself obliged to take the stone, and went to the forwarder, the plaintiff's witness, and told him so, and that in consequence he should not be able to take his salt, but would take the plaintiff's goods. He swore that the forwarder made no objection whatever, and that the plaintiff had expressed great anxiety to get the goods taken over. He admitted that the plaintiff had asked him whether he thought he could get the furniture over without damage, (there were some tables and several articles of cabinet-ware,) and he told him he thought he could, supposing that he meant without being scratched or injured in that way.

The bill of lading was in the usual form given in these cases, *i. e.*, "shipped on board," &c., "the following goods, in good order, to be delivered in like good order, *dangers of navigation excepted.*"

The Malta, it appeared, was a schooner registered of 47 tons measurement, but carrying, as is usual, much more burthen than her registered tonnage. On the last trip previous she had taken 89 tons of stone plaster across the lake, and the captain swore that she could have taken five tons more. On this occasion they took on board 75 tons of plaster; the plaintiff's goods about three tons, and about two tons of other things for another person.

As it was late in the season they waited for some days for a favourable time, when a few hours only would be required for the trip. They sailed on the 16th, and the wind coming a-head, they returned after being out two hours. Then on the next day they sailed again, about 2 P. M., with a light wind from E. S. E. which was perfectly fair; but the wind increased till about four o'clock, when it rained and blew a gale—the wind shifting to N. E. and afterwards to N. W., and a heavy sea got up, which occasioned the vessel to leak; and to ease her they put away more before the wind and made for the south shore, thinking to make Genesee harbour. They made land below the harbour, but it was snowing so hard that they could not see the harbour distinctly, and the captain worked off shore, hoping to get up to Niagara. The sails and rigging froze stiff, and finding themselves embayed, and unable to weather a point of land to the westward of them, they found that they must go ashore, and ran on the most favourable part they could find

She filled and became a total wreck, and the plaintiff's goods were lost or destroyed.

Two of the sailors swore that she was too deeply laden, considering the lateness of the season: that she leaked badly, and took in water besides when the sea broke over her, having no hatch cloths: that she was only a foot or fifteen inches out of water. These witnesses also swore that the vessel was sufficiently manned: that they all worked at the pumps: that the vessel had leaked before, but not dangerously: that the weather was very boisterous—a heavy gale and snow storm: that the weather was fine when they left Oswego; and that if it had continued so they would have got over without difficulty.

The captain swore that the vessel had been deeper laden that season than she was on this trip: that she had leaked in some degree all summer, but had been repaired: that during the gale she leaked badly, which induced them to change their course and put more before the wind: that she was a seaworthy, good vessel: that the storm caused her loss: that if it had been clear weather they could have entered Genesee harbour, but could not venture in in the snow storm, and endeavoured to keep out. The men were on duty all night, the captain himself steering.

I told the jury that the plaintiff could not recover upon the first count, because he had there declared as upon an ordinary contract of a common carrier, without any qualification, which would leave the carrier subject to all risks, except from the act of God or the king's enemies; whereas it was clear from the bill of lading that the perils of navigation were expressly excepted, against which the defendant on such a contract made by his agent did not engage to insure, but left the owners of cargo to insure for themselves, as the plaintiff, acting prudently, would have done in this case: that this substantial variance in stating the contract, precluded a recovery on the first count: that, with regard to the third count, which charged the defendant with misleading the plaintiff by an undertaking not to carry plaster, and with fraudulently deceiving him in that respect, it was for the jury to say whether they found that proved, or whether they found nothing more than an answer given in good faith, and true at the time, to an enquiry made in an ordinary manner, and not with any intention expressed of exacting a stipulation such as stated; and I thought it was not probable that upon the evidence they would feel it safe to take what passed in any other light: that if the forwarder had withheld the plaintiff's goods, and the vessel had arrived safely, being perhaps the last opportunity that season, and if the plaintiff had sued him for not shipping the goods, there seemed

hardly to be any ground for holding, upon the evidence, that the forwarder would have been justified because the captain had changed his mind and taken the plaster, which indeed was no more objectionable, perhaps, than salt, supposing the tonnage to be equal: that if the jury were not satisfied that the captain gave any promise not to carry plaster, then the case must turn on the second count, and the question would be, whether they were of opinion, on the evidence, that it was not the dangers of navigation that prevented the safe carriage of the goods (in which case the loss would come within the exception in the bill of lading, and the defendant would not be liable), but that the loss arose from the negligence of the defendant and his servants—that is, of the master and crew. I made such observations as the evidence seemed to call for in regard to the leakage of the vessel, and any evidence of her general seaworthiness, and next on the fact of her being improperly laden with reference to the time of year and description of cargo. I told them that where it was evident, as it appeared to be here, that the proximate cause of the loss was the perils of the navigation, the vessel being actually wrecked in a storm, it could only be upon very plain proof of negligence or improper conduct, in overloading or otherwise, that the loss could be thrown upon the ship-owner, notwithstanding the exception in the bill of lading: that courts of justice discountenanced nice investigations of that kind, which were sometimes attempted to be gone into as between insurers and owners of cargo; because, if such a course were allowed, the insured would never know when he was safe: that gross and evident overloading, such as would make it unlikely that the vessel would cross the lake in safety under ordinary circumstances, ought alone to make the defendant liable; but in considering the facts, due regard must be had to the lateness of the season: that setting out, as they did, with a fair wind, a few hours would bring them to their port; that they waited till they got a favourable time, and that the sudden shift of wind seemed to have caused their misfortune; but they must first consider whether the seventy-five tons of plaster and five tons of other goods were not an unreasonable and unfit cargo for such a craft at such a season, registered at forty-seven tons and loaded nearly to her utmost capacity: and with observations on the arguments for and against the defendants on this question—whether the loss should be ascribed to negligence, or the perils of the navigation—the case was left to the jury.

The plaintiff's counsel contended that it lay on the defendant to shew clearly that the loss arose from perils of the navigation, and so came within the exception; to which I acceded, but held that where a case

of shipwreck from stress of weather was clearly shewn, as it was here, then it lay on the other side to establish that the loss would nevertheless not have happened but from negligence or want of skill; as in this case, that if the vessel had had less cargo she would have leaked less; that the captain could in that case have persevered in his efforts to gain a harbour on the north shore, and might not have been forced to put away before the wind.

The jury on this direction found their verdict for the defendant.

I have stated the facts minutely, because these cases present questions of much interest in a commercial country such as this is; and if what is decided in one case is to form in any degree a precedent to be acted upon in others, it is essential that all the circumstances which could have influenced the decision should be known. My brothers have considered the case, and I understand them to be of opinion that the jury ought not to have been directed otherwise than they were. I think so also, after fully examining the evidence, and referring to the adjudged cases. There is no fault, I think, to be found with the verdict, rendered as it was upon a charge as favourable to the plaintiff as the evidence warranted.

I see no ground on which the same principles should not govern in this case as in actions against insurers, where the defence has been set up that the loss arose from the negligence or unskilfulness of the master and crew, and not from the perils of the sea, which were insured against, though the question is presented in a different form. Here the plaintiff's agent saw the goods laden, and did not remonstrate; and certainly the perils of the navigation, from violent adverse wind and the snow-storm, were the proximate causes of the loss. There is no doubt that the defendant was entitled to a verdict on the first and third counts. The case turned on the second count; and, though it may be that a verdict for the plaintiff on that count might have been supported, yet I think the verdict that was given is more consistent with the evidence. To find for the plaintiff in such a case, upon a rigid view of the point of alleged negligence, would encourage owners of cargo to save themselves the expense of insuring, and to attempt in case of loss to make out some case of negligence or unskilfulness, that might take the case out of the exception in the bill of lading of losses by perils of navigation, and throw the loss upon the ship-owners. This as was remarked by the Court of King's Bench, in *Walker* v. *Maitland*, 5 B. & Al. 171, would introduce very troublesome and uncertain inquiries, and would be inconsistent with the security that should prevail in commercial transactions. If the plaintiff in this case had done what is

usual, and had insured his goods against the perils of navigation, then, I think, it is quite clear, upon the case which I have just referred to, and others which I shall presently cite, that, under the circumstances of this loss, he would have recovered. Then, as he omitted to insure, and at the same time accepted a bill of lading which expressly excepted damage arising from the perils of navigation, it is reasonable to look upon him as having taken upon himself the risk which the insurers would otherwise have taken, where the policy is in the proper terms. The master, when he sailed on this voyage, had a right to suppose that either the plaintiff was insured, or that he chose to run the ordinary risks himself; and I can see no reason why the same principles should not apply here as in insurance cases.

I refer to the case I have cited of *Walker* v. *Maitland* to *Busk* v. *Royal Exchange Insurance Company*, 2 B. & Al. 73; *Bishop* v. *Pentland*, 7 B. &. C. 219; *Holdsworth* v. *Wise*, 7 B. & C. 794; *Shore* v. *Bentall*, Ibid. 798; *Phillips* v. *Headlam*, 2 B. &. Ad. 380; *Sadler* v. *Dixon*, 5 M. &. W. 405, and same case in error, 8 M. &. W. 895; *Redman* v. *Wilson*, 14 M. & W. 476; Arnould on Insurance, pages 770, 803, 1342; *Heyman* v. *Parish*, 2 Camp. 149; *Muddle* v. *Stride et al.*, 9 C. &. P. 382. In *Buller* v. *Fisher*, 3 Esp. N. P. C. 67, Lord Kenyon ruled at Nisi Prius to the effect, that if there has been any degree of negligence in the navigating of the vessel, the loss will not come within the exception in the bill of lading of "perils of the sea," and the ship owner will therefore be liable; but this is treated at present as an inaccurate statement of the law.

Rule discharged.

GRIERSON V. THE PROVISIONAL MUNICIPAL COUNCIL OF THE COUNTY OF ONTARIO.

By-law—objections to, not apparent on the face—mode of imposing rates for county purposes—12 *Vic. chaps.* 78 & 81—13 & 14 *Vic. chaps.* 64 & 67—14 & 15 *Vic. chaps.* 109 & 110.

It is not necessary that a by-law to raise money for county purposes should contain all the provisions required to perfect the measure; and, therefore, the same by-law which provides for raising the loan and imposing the rate, need not apportion the sums to be paid by each municipality, for that may be provided for by a subsequent by-law.

A by-law imposing a rate for county purposes, to be levied on the *actual* value of all taxable property in the county, is not objectionable, though in villages &c. the taxes are directed to be levied on the *annual* value, for such direction is intended only to apply to rates imposed for their own purposes.

The court is not bound under the act to quash a by-law, unless it appear to be illegal on the face of it. Where it is attempted to be proved so by extraneous evidence, it may be discretionary with the court, upon such evidence, when acting under their common law jurisdiction, to say whether the by-law shall stand or not.

Cameron, Q. C., in Michaelmas term, obtained a rule nisi on the defendants, to shew cause why a by-law, passed for raising a loan of 6000*l.* for the erection of a court house and gaol in the county of Ontario, should not be quashed with costs:

1. Because the said provisional council which passed it has no power to levy any rate on the ratable property of the village of Oshawa, being an incorporated village within the said county.

2. Because the rate levied on the property in the said village should have been assessed upon the annual, and not upon the actual value of the ratable property of the said village.

3. Because the assessed value, whether annual or actual, should have been stated separately and distinctly in the by-law.

4. Because the actual value of the ratable property in the village, for 1851, is wrongly estimated in the by-law, on the assessed value of the ratable property of the whole county.

5. Because the annual value of the ratable property of the village for 1851 was 5,550*l.*, equal to an actual value (under the assessment law) 92,500*l.*, while the council have apportioned the rate in the by-law on 61,666*l.* as the actual value upon the said assessment of 5,550*l.* of the annual value of the ratable property of the said village.

The by-law moved against was passed on the 7th of September, 1852. It is a by-law to raise, by way of loan, 6000*l.* and interest, payable within twenty years, for the erection of a court-house and gaol within the county of Ontario, viz., in the village of Whitby. It recites that it will require 9780*l.*, to be raised by a special rate, for the payment of such loan and interest within twenty years from the 7th September 1852; and it specifies the sum to be raised under it in each of the twenty years. It also recites that the amount of ratable property in the county of Ontario amounts to 1,459,760*l.* assessed value for 1851, and that it will require the several rates in the pound mentioned in the schedule annexed to the by-law, on such ratable property, as a special rate for the payment of the interest and the creation of a sinking fund for the payment of the principal of the loan, according to the 177th section of 12 Vic. ch. 81, as amended by statute 14 & 15 Vic. ch. 109.

And the by-law enacts that the warden may negotiate for, and raise such loan, and may issue debentures for the same, and that the money shall be applied to the purpose recited; that the rates imposed shall be

raised and collected in addition to all other rates, and that the by-law shall take effect from its date.

In the schedule of rates referred to in the by-law as forming part of it are inserted the fraction of a penny in the pound which is to form the rate in each of the twenty years; *ex gr.* in 1852 to make 660*l.*, the sum to be raised in that year, $\frac{1}{1000}$ of a penny in the pound is imposed; for 1853 to make 642*l.*, the sum to be raised in that year, $\frac{1}{1000}$ of a penny is the rate imposed.

This application against the by-law was supported by an affidavit of Thomas N. Gibbs, that he is reeve of the village of Oshawa, and as such took to the County Council of the United Counties of York, Ontario, and Peel the certified return of the clerk of the Municipal Council of the Village of Oshawa of the assessment roll of that village for 1851; that it amounted to 5,550*l.*, as the annual value of the ratable property in the village; that that sum was assessed as the annual value for that year (1851); that it was adopted by the Provisional Council as the assessment for that year, and was made the basis for the rate to be levied under this by-law; that the same Provisional Council, in estimating the actual value of the ratable property of Oshawa for 1851, have made it 61,666*l.*, and on such actual assessed value have based the estimate, and levied the rate in the pound for the purpose of this by-law; whereas the actual assessed value, based on the annual assessed value as it should be by law, would amount to 92,500*l.*

There was annexed to this affidavit a certified copy of the assessments in the county of Ontario for 1851, on which the assessment under this by-law was directed to be made. This paper, signified by the clerk of the county of Ontario, and to which their seal was attached, gave the "return of the aggregate value of the assessed property in 1851, as rendered by the several township clerks;" and in this return Oshawa village was included as having assessed property of the actual value of 61,666*l.*, and of the yearly value of 5,550*l.* The clerk certified in this paper that the valuations contained in it were the valuations on which this by-law was based.

In opposition to this application it was sworn that the taking 61,666*l.* as the actual value arose from a mistake, into which the council were led by Gibbs, on whose affidavit the application was founded, and who took upon himself to reduce the value returned to 61,666*l.*, on his own idea that that was a fairer valuation, being a member of the finance committee of the united councils.

The warden swore that he did not know until June last that the sum of 61,666*l.* was not the full value. And it was sworn by the clerk of the

Provisional Municipal Council of Ontario that he took the returns from the printed minutes of the county councils of the united counties which stated 61,666*l.* to be the actual value: that he believed it to be correct, and found, on endeavouring to prove its correctness by the sums imposed on the several localities by the county council, and upon Oshawa as one of them, "that the sum so stated to be levied on Oshawa, at the rate therein given, did correspond with a fund representing 61,666*l.*: tha he never knew till after the by-law was passed that the actual value in regard to Oshawa had been misstated, and first learned it from Grierson (the applicant) and Gibbs, when Gibbs admitted that he had adopted the 61,666*l.* as correct in framing by-laws for other purposes, and that the return of the council had been made out from a return for Oshawa in the handwriting of Gibbs himself: that the difference in the taxation of Oshawa produced by the error is in favour of Oshawa for the first year of such taxation (1852), and only amounts to 13*l* 17*s*.

Wilson, *Q. C.* and *Connor*, *Q. C.* shewed cause; they cited *Rex* v. *Stacy*, 1 T. R. 1; *Rex* v. *Smith*, 3 T. R. 574.

Cameron, *Q. C.* and *Hagarty*, *Q. C.* contra, cited *Rex* v. *The Justices of the West Riding of Yorkshire*, 12 East. 117; *Bates* v. *Winstanley et al.*, 4 M. & S. 429; *Mercer* v. *Davis*, 10 B. &. C. 617.

The statutes referred to are noticed in the judgment of the court.

ROBINSON, C. J.—I should have taken more time to make up my mind upon this application, if I were not apprehensive that considerable public inconvenience might arise from the county being kept long in suspense.

I have examined all the statutes which seem to bear upon the question, and though I cannot declare myself to be free from doubt on one or two points, my opinion is that there is nothing in this by-law which it is our duty to set aside as illegal.

The enactments which seem necessary to be considered in connection with the subject are the following:—12 Vic. ch. 81, sec. 36; sec. 41, subsecs. 2, 21, 22; sec. 60, subsec. 22; sec. 155, 176; 177, as amended by 14 & 15 Vic. ch. 109, sched. A No. 24; sec. 179:—12 Vic. ch. 78, secs. 11, 12, 14;—13 & 14 Vic. ch. 64, secs. 9, 11; sched. A. part 32, amending sec. 172 of 12 Vic. ch. 81:—13 & 14 Vic. ch. 67; secs. 6, 11, 13, 21, 31, 32:—14 & 15 Vic. ch. 109, secs. 4, 10, Sched. A. No. 24:—14 & 15 Vic. ch. 110, secs. 5, 6.

It would be unreasonable to expect that in such a multitude of provisions there should not be found some real or apparent inconsistencies, and some enactments of which we do not readily see the intention and effect.

I take it to have been meant by the legislature, that by-laws to be passed in towns and villages shall impose their rates for the purposes of such towns, &c., upon the annual value of property liable to taxation. In townships it is the actual value that is to be rated, and the county councils are to be furnished with returns of the actual value of ratable property within every municipality, including cities, towns, and villages, as well as townships. And it seems to be intended that the municipal councils, having before them the aggregate ratable property within every municipality, when they desire to contract a loan for any county purpose, shall assign to such locality its proportion to be contributed towards such loan, and shall by a by-law direct that to be levied and collected within such municipality. But such by-laws need not, as I conceive, be the law in which provision is made for the loan, and for imposing the aggregate annual rate to meet it. All that is necessary is that the county council must pass such a law, which will be the authority to the village municipality to add that to the other sums to be contributed in that year for county purposes, and it rests with the village municipal council to take the necessary steps for raising the aggregate sum for all county purposes as the law directs. The taxes will be raised by the village collectors, and paid to their treasurer of the locality, who is to pay over the money to the county treasurer. This is provided for by 172nd clause of 12 Vic. ch. 81, as amended by 13 & 14 Vic. ch. 64, schedule A. 32.

As to the mode of laying the rates, the assessment act, 13 & 14 Vic., ch. 67, sec. 6, provided that they should be levied upon the whole taxable property, real and personal, in proportion to its value. This gives one general rule for all; and it means, as I suppose, the actual, not the annual, value. The 11th and 13th clauses seem to be intended to apply to by-laws of the village councils imposing rates for the purposes of the locality: sections 31 and 32 of the same act provide for the case of rates to be levied in each locality for county purposes; and the 31st clause, for some purpose, does require that the annual value shall be returned to the council, in regard to localities, such as incorporated villages, where taxes are directed to be levied by a rate on the annual instead of the actual value.

It is the fourth clause of the statute 14 & 15 Vic., ch. 109 which directs how by-laws for the purpose of raising loans for county purposes shall be framed; and I see nothing in that inconsistent with what I believe to have been intended throughout—namely, that the county council, in regard to all sums which they authorize to be raised by loan for county purposes, are to lay their rate in the pound on the actual

value of all taxable property in each locality, which rate is to be founded on a computation of the loan required to be raised, its proportion to the aggregate value of all the ratable property in the county, and the proportion which the ratable property in each locality bears to the whole.

I do not indeed at present understand how the different enactments could be carried out, unless for such purposes the county council take as their basis the aggregate actual value in all localities, and lay the assessment upon that. I do not see how a calculation could result in one rate upon property assessed by the two modes of taxation; and I confess I do not see clearly what is meant by the sixth section of the 14th & 15th Vic., ch. 110, unless it is to give the rule by which the councils are to turn the annual value of village property into actual value, for the purpose of combining all in one sum representing the actual value.

However, what we have now to consider is, whether this by-law is on the face of it in the whole or in part illegal. It seems to me to follow closely the directions given in the fourth clause of 14 & 15 Vic., ch. 109. It recites the sum to be raised by loan, the object of the grant, and the amount which it will be necessary to collect in each year in order to pay off the debt and interest within twenty years, and it specifies when such amounts shall be payable; next it states what is the amount of the whole ratable property of the county, which surely must be meant by the act to be the whole amount according to its valuation; and, lastly, the rate in the pound upon that property, which cannot but be a rate imposed according to one uniform basis of valuation.

Now, as to the objections to the by-law, taking them in their order: First. The county council is not by this by-law laying any rate upon property in Oshawa; they are only providing for raising a loan, and securing repayment to the person who shall advance it. This we must take to be merely the foundation of other measures which are yet to be passed. The question is only whether this by-law is legal so far as it goes, not whether it does all that is necessary to be done for perfecting the measure.

Secondly. The county council will have to direct hereafter, if they have not already done so, what sum Oshawa must contribute in each year towards repayment of this loan; and when the village council comes to raise the money, they will have to take care that they do so by such a method of taxation as the laws allows.

Thirdly. I see no necessity for this by-law containing more than it does. The County Council will no doubt have to pass a by-law stating what sum in each year Oshawa must contribute.

Fourthly and Fifthly.—I do not see at present that the council could do otherwise, if they comply with the act, than give the actual aggregate value.

These exceptions turn upon something extrinsic of and behind the by-law: and I consider, as I have already stated on a former occasion, that if we should assume a control over by-laws upon such grounds as are relied upon in this exception, it would not be properly under the 155th clause of the 12th Vic. ch. 81, but under our common law jurisdiction in such cases; and, looking at the affidavits filed, I do not think that we should be exercising a sound discretion in setting aside by-law for a purpose of such magnitude, and at the risk of producing much public inconvenience, upon an allegation of an error in amount which in its result must be so insignificant—when the effect of it too, supposing the error to have been committed, is to diminish, though in a very slight degree, the burthen upon the village of Oshawa.

BURNS, J.—The first point to determine is, whether there be anything on the face of the by-law in question which renders it illegal; and if not, then, secondly, are the facts extraneous such as must necessarily compel the court to quash it.

The recitals in the by-law appear to me sufficiently to comply with the requisitions of the 177th section of 12 Vic., ch. 81, as amended by ch. 109 of 14 & 15 Vic. The statute enacts that thereafter every by-law for creating a debt or contracting a loan, shall recite or set forth by way of preamble four things. This by-law does recite these matters, but it is contended that the spirit of the act of parliament requires that the by-law should enact the matters, and that merely reciting is not sufficient. The legislature could never mean that the corporation must in every such by-law enact, for instance, that the whole ratable property of the county amounted either to one sum or to another sum. It would be sufficient to recite what the ratable property amounted to, in order that it might be seen whether the rate proposed to be levied would be sufficient to liquidate the debt within the time mentioned. Of course, notwithstanding the recital, it would be necessary that the by-law should enact or give authority to create the debt, and to bind the corporation to pay it, and to enact the special rate to be levied upon the property of the county liable to be rated. This is done, I think, as plainly as it could be done.

It is next objected that the county has no power to levy any rate on the ratable property of the village of Oshawa, an incorporated village within the county; and it is contended that the County Council should have signified to the corporation of Oshawa what proportion of the sum

was required from that body; and then the authorities of the latter body were the proper authority to direct the amount to be levied, according to the annual value. This objection is founded, in my opinion, upon an entire misconception of the scope and authority of the county council. This body is composed of the town reeves and deputy town reeves of the several townships, villages and towns in each county, with the power, according to the 22nd sub-division of sec. 41 of 12 Vic., ch. 81, of levying, collecting and appropriating such moneys as may be required for its legal purposes, by means of a rate or rates, to be assessed equally on the whole ratable property of the county liable to assessment. When the county council has determined the amount which each township or incorporated village or town in the county shall contribute, it is the duty of the county clerk to certify the same to the township, town or village clerk; and in his turn it is his duty to make out a collector's roll for the township, town or village, in which the county rate shall be described separate and distinct from the township, town or village rate.—*Vide* secs. 31 & 32 of ch. 67, 13 & 14 Vic. The collector's duty is to collect all the rates upon the roll, and pay over the same to the treasurer of the township, town or village; and such treasurer shall pay over to the county treasurer the portion belonging to the county. And if the corporation of the township, town or village do not cause the amount to be paid over to the county, the treasurer of the township, town or village, and his sureties, are liable to the corporation of the county; and the collector also, if he be in default, shall be liable to the county council, *whenever they shall choose to proceed against him, instead of against the corporation of such town or village.*—*Vide* sec, 172 of ch. 81, 12 Vic., as amended by sch. A of ch. 64, 13 & 14 Vic. But, to show that incorporated villages within a county which are represented in its council stand upon the same footing with townships, we have only to read the 59 section of ch. 81, 12 Vic., which enacts that the municipality of every village which shall be formed under the provisions of the 58th section shall have the same powers, duties, and liabilities as the municipality of a township; and the officers thereof shall have the like powers, duties, and liabilities. Oshawa was erected into an incorporated village by the act itself, but we can hardly imagine the legislature intended that those villages incorporated by the act should stand on a different footing from those which might become incorporated under its provisions.

The other objections to this by-law are founded upon the facts of the case, independent of anything upon the face of the by-law. A very important question arises upon this branch of the subject, and it is this

—to what extent the court is bound to give way to objections which may be made to the legality of by-laws, which depend upon extraneous matter. I have already said in *Rolls* v. *the Municipal Council of Welland*, that where a by-law did not disclose something illegal on the face of it, and such illegality depended upon something to be made out by other evidence, the court was not, in my opinion, called upon to notice, any objection which the evidence did not clearly point at, and upon which the council should have notice, and be called upon to answer. It appears to me reasonable it should be so; and, applying the same train of reasoning in this case, I do not think the legislature intended that the court should be compelled to avoid a by-law, because it could be made out by proof that some error was committed in a calculation, or something of that sort done, which would in strictness be illegal. If we were bound to such strictness, we might find that we should be obliged to decide all things done under a by-law illegal and void, because after some months it was found that an accidental mistake had been made in a column of figures. I am of opinion that the true construction to give to the powers vested in the court to quash by-laws is, that, unless the by-law be illegal on the face of it, it rests discretionary with the court, upon extraneous matters, to say whether there is such a manifest illegality that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained. This view is, I think, strongly fortified by the case of *Jones* v. *Johnston*, 5 Ex. 862. That case arose upon the 92nd section of 5 & 6 Will. IV. ch. 76, the Municipal Corporations' Act of England, very similar to ours. Under the section mentioned, the rents and proceeds of all corporate property, and all fines received, were to be carried to account of the borough fund; and payment of debts, &c., salaries of the recorder, town clerks, treasurer, and other officers, and election expenses, were to be paid out of such fund; and then the section enacts—"*and in case the borough fund shall not be sufficient* for the purposes aforesaid, the council of the borough is hereby authorized and required from time to time to estimate as correctly as may be what amount, in addition to such fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this act; and in order to raise the amount so estimated, the said council is hereby authorized and required from time to time to order a borough rate, in the nature of a county rate, to be made within their borough; and for that purpose the council of such borough shall have within their borough all the powers which any justices of the peace," &c. The question depending was, whether the rate declared under this authority was retrospec-

tive or prospective, it being contended that if retrospective the rate was void. Whether it were the one or the other had to depend upon evidence extraneous of the order. It seemed that some previous debts were included in the rate. The plaintiff resisted the payment of it, and replevied his goods when seized under a warrant. Chief Baron Pollock says—"in my opinion, it never could have been intended that so many difficulties should be thrown in the way of making a rate. We ought therefore, to give such effect to the words of the statute as will best meet the exigencies of the case. The legislature has provided that the borough council is to make an estimate, if that can be done, for the purpose of providing prospectively for those expenses. It may, however, happen that this may not be possible, although made with all due care and fairness. It may be that the prospective estimate will fall short of the demand upon it, or persons may fail to pay their rates, or the rate may become unproductive from some other cause. It is impossible for the council to guard against all such matters. It therefore appears to me that, under such circumstances, if a rate is made prospectively, and it turns out to be inadequate to the occasion, and another rate is requisite, it is competent to the council to make it. But the question here is whether the rate is prospective or retrospective; and I am of opinion that in point of fact it is prospective, for it was made *bona fide*, and for the purpose of providing for payments which it was expected would become payable thereafter." In the same case Baron Parke says—"The next question is, whether this rate is bad as being retrospective, on the ground that the estimate of the council included by-gone expenses; and the principal objection is, that the solicitor of the corporation paid a certain sum of money for costs to save the corporation from an execution, which sum was to be included in the bill that he had not then delivered. I think this circumstance does not affect the question as against the defendants, for they issue their warrant in respect of a rate which, upon the face of it, is perfectly good. The council has estimated the money which is to be repaid to the solicitor; and, although the rate be in fact made in part for by-gone expenses; it is not a bad rate as regards the defendants, unless it be clear on the face of it that it was meant to include by-gone expenses. In *Chesterton* v. *Farler*, which has been referred to, in in a suit for the nonpayment of a church rate, a prohibition was moved for to the Privy Council, to which an appeal had been made, on the ground that the rate appeared to be retrospective and bad from what appeared upon the pleadings. This court refused a prohibition, the cause being before a court the jurisdiction of which was not denied, so

erroneous proceedings having taken place there, and the court refusing to presume that the judicial committee would act incorrectly. *Rex* v. *Sillifant*, 4 A. & E. 354, seems to shew that where a rate was regular on the face of it, but appeared to have been made to meet past disbursements, it was not therefore bad, whatever objection might be raised to a retrospective application of the money in passing the churchwardens' accounts. Therefore, in the present case, if the town council were wrong in making a retrospective rate, no advantage can be taken of that fact in an action against the defendants in this case, being the magistrates who enforce the rate by distress. I by no means say that the town council were wrong in the course they took. They thought they were right, and there was nothing fraudulent in their conduct. Some latitude must be allowed them under the circumstances; for they cannot ascertain in all cases with exactness the amount of money that will be wanted, but are bound to raise as nearly as possible the sum that will be required." I have quoted from this judgment at considerable length, because the principle upon which the by-laws of the different municipal corporations may be attacked is very important to be well considered and understood. It will be seen that the case mentioned was brought before the court by the party from whom the rate was claimed resisting the payment, and when his goods were seized having replevied them; and he contested the right to make such a rate by shewing matter not upon the face of it, whereby to avoid it as illegal. If the inhabitants of Oshawa, or even any one of them, contest the illegality of the present by-law, it is, I conceive, open to them to take the same course as in the case cited, and then they may obtain the opinion of the court of last resort in such case. Authority being conferred upon the court to quash, by a summary application, such by-laws as may be illegal in the whole or in part, must, I think, be qualified by the question whether the same be illegal in the whole or in part upon the face, and that a discretionary power must be vested in the court in cases where the illegality is to be proved by matter extraneous. If any of the collectors have found it necessary to enforce the payment of the rate by distress, and we should quash this by-law, they would be trespassers, having nothing to fall back upon and justify their proceedings. Besides, if parties have paid their rates under pretence of a good by-law held out to them, of which they could not be supposed to know whether it were good or not, what is there to prevent the recovery back of the money so paid? All these difficulties are liable to occur, independent of the fact of involving the holders of the county debentures in troubles, that they from reading the by-law in question could not for a moment suppose themselves subject to.

The objections made, as appears from the affidavits, are several. First, that the rate upon the property of the village should have been assessed upon the annual and not upon the actual value of the ratable property. There is nothing in this objection. The 120th section of ch. 81, 12 Vic., enacts that in future the collectors' rolls for the different townships, incorporated villages, and wards, shall contain the amount of the assessed value of the real, and also of the personal property of each person whose name shall appear upon such roll. The 11th section of ch. 67, 13 & 14 Vic. enacts that the sums which shall be required by law, or by any by-law of any township or county, shall be taxed, rated, and raised upon estimate of the amount required; but in cities and incorporated villages the taxes shall be imposed by by-laws, declaring the yearly rate in the pound to be levied on the yearly value of all taxable property; and the yearly value of taxable personal property shall be held to be six per cent. on the assessed value thereof. The meaning of this provision clearly is, not that the county rate upon incorporated villages shall be levied according to the rate which the incorporated villages are bound to levy upon themselves for their own purposes, but that the city or incorporated villages are bound to levy their rates in one mode, and the townships and counties in another. The incorporated villages within the county, as regards the county rate, will be equalized with other portions of the county, which they would not be if the rate were levied according to the yearly value, including personal property, in the mode mentioned. The 120th section of ch. 81, which I have before referred to, and the 31st section of ch. 67, shew what is required, and what is to be done by the clerks of the towns, incorporated villages, and townships, and this is, as it is expressed, to be for the guidance of the county council, which is directed by-law to say what portion of such sum as the county may require shall be levied in each township, or incorporated town or village.

The next objection is, that the assessed value of the ratable property in the village of Oshawa, whether annual or actual, should have been stated separately and distinctly in the by-law. I can discover nothing throughout the acts to lead me to suppose that the legislature placed incorporated villages within the county upon a different footing from the townships, except as to their internal government and mode of levying rates for their own uses and purposes.

The next objection, however, is the one mainly relied upon to avoid this by-law, and that is, that the ratable property for Oshawa is put

down at 61,666*l.*; whereas, upon a calculation of the annual value of 5,550*l.* at six per cent., it should have been 92,500*l.* I am not prepared to say that what the council did was an error: on the contrary, it may be right that they should assume the ratable property of Oshawa to be 61,666*l.* I look upon the latter part of the 11th section and the 13th section of the Assessment Act, ch. 67, 13 & 14 Vic., to be special provisions for cities and incorporated towns and villages in regard to their own taxation, and not to apply to taxation for county purpoes. It is assumed that 5,550*l.* yearly value should produce, as ratable property, 95,500*l.*; but I do not see that such must necessarily be so. As to whatever proportion of the 5,550*l.* covered the taxable personal property of the village, it would be so, but a different result might be the case as respects the real estate. As regards the latter, every separate tenement with a quarter of an acre or less shall be estimated at the real rack rent or full yearly value, and the vacant land shall be estimated at an interest of six per cent. yearly on the full actual value thereof. The vacant land being so estimated, it is capable also of being turned into an amount of ratable property by calculation, as in the case of personal property. As respects the real estate occupied, there being no criterion by which to turn the rack rent or full yearly value into its full value, as the assessors would appraise the same in payment of a just debt due from a solvent debtor, it is impossible to ascertain what its ratable amount would be without a calculation from some given data; and without that it is matter of opinion what the probable actual value, as if taken in payment of a debt, might be. That these provisions are applicable specially to cities and incorporated towns and villages, I refer to the language of the 6th section, which enacts that the taxes to be levied either under the Assessment Law or the Municipal Corporations' Act when no express provision shall be made in respect thereof, shall be levied upon the whole taxable real and personal property of the locality to be taxed, in proportion to the assessed value thereof. Unless that be so, and unless it is the duty of the county council to equalize the taxation in proportion to the assessed value of the property of the county, I cannot understand the provisions of the 31st section, which enacts that the county council shall by by-law direct what portion of the sum required for county purposes shall be levied in each township or incorporated town or village. If my view be the correct interpretation of the legislative enactments, and if the powers of the county council be as I have stated, it then follows that we cannot say that the council did

wrong in fixing the ratable property of Oshawa at 61,666*l.* for we have no data given as to the proportion of the 5,550*l.* which may have been assessed upon occupied real estate. But, if we must necessarily assume that the whole 5,550*l.* must be turned upon a six per cent. calculation, without reference to the variation there may be between the real value and the rent of occupied lands, in order to produce the whole amount of ratable property, then it is shewn on the part of the council that they acted *bona fide* in the matter; and there does not appear to have been any idea or intention that one portion of the county was intended to be favoured more than another, or that one should be taxed lighter than another.

It appears to me that the rule should be discharged, and it must be with costs.

DRAPER, J. concurred.

Per Cur.—Rule discharged.

DOE DEM. CAMPBELL v. CROOKS.

Patent—Inconsistent description of land granted—Appropriation for clergy reserve, effect of.

In a patent the land granted was described as "a certain parcel of land in the township of Niagara, containing by admeasurement thirty-five acres, be the same more or less, which said thirty-five acres of land are butted and bounded as follows, &c." It appeared that the boundaries given would embrace about seventy acres, including several lots in the town of Niagara (From the facts proved it was clear that this was not the intention of the government in making the grant.)

Held—First, that the description of the land as in the *township* of Niagara coming first must govern, and the boundaries be regarded as erroneous; and therefore that no land could pass which at the granting of the patent was included in the town.

Secondly, it being shewn that in patents bearing date both before and after that to the defendant, the lots claimed by him were declared to be set apart as clergy reserves: that such declaration was conclusive as against the crown, and would prevent the land so appropriated from passing to the defendant, independently of the first objection.

(Q. B., E. T., 15 Vic.)

Ejectment for lots 84, 85, and 86, in the town of Niagara.

Mr. Crooks defended for thirty-five acres, situate in the town of Niagara, formerly in the township of Niagara, describing them as they are described in a patent to the Hon. D. W. Smith, hereinafter mentioned; and it was explained at the trial that he defended for lots 84 and 85, and part of 86.

At the trial, before Robinson, C. J., at Niagara, it appeared that, on

the 25th of May, 1796, David William Smith, who was then Surveyor General of Upper Canada, petitioned the Lieutenant Governor in council, setting forth that his late father "memorialed the government to grant him a small farm *adjoining the town of Newark*," that he, the petitioner, had abandoned the possession of so much of it as fell within the military reservation at Mississagua Point, by removing the fences and orchards, and by commencing to pull down the buildings, and he prayed the government to grant him "what remained lying *between the said reserve, the town of Newark*, a small run of water and lake Ontario, containing about *twenty-five or thirty acres*."

This petition was favourably answered on the 3rd of June 1796, and on the 25th of August, 1796 letters patent were issued, granting to the Honourable David William Smith, his heirs and assigns, "a certain parcel of land in the township of Newark, containing by admeasurement thirty-five acres, be the same more or less, which said thirty-five acres of land are butted and bounded as follows, viz:—Beginning at the north-west angle of the military reserve, near Mississagua Point, on the banks of lake Ontario, thence south 10 chains, then south 55° east 13 chains, thence south 35° west 8 chains and 32 links, thence north 55° west 40 chains, thence south 55° west 7 chains and 32 links, thence south 35° west 15 chains, then westerly, on the west bank of a small creek, to the lake Ontario, then following the courses of the lake easterly to the place of beginning."

In this patent a reservation was made for a protestant clergy of 5 acres in lot 125, in the township of Newark.

The government a few years ago, advertised the lots 84, 85, and 86 for sale, as town lots in the town of Niagara, (formerly called Newark,) having been reserved as clergy reserves, in respect of other town lots in the town, of which grants had been made by the crown. The present lessor of the plaintiff became the purchaser of these lots at the government sale, and claimed them in this action, under that title.

The defendant maintained that they were part of the land granted by the patent referred to in 1796 to the Honourable D. W. Smith, and it was admitted that whatever lands were included in that patent came to the defendant by purchase from Mr. Smith.

The question was whether these lots were or were not embraced in Mr. Smith's patent. This, it was agreed at the trial, should be submitted to the opinion of this court, and a verdict entered accordingly.

It was proved that these three lots, 84, 85, and 86, had been always up to the time of the trial lying as waste land, unoccupied and unim-

proved, and that the tract understoed to be embraced in Mr. Smith's patent had always been allowed to lie unoccupied.

It will be seen that the description in the patent takes no notice of the town of Niagara, (or Newark,) nor of any street in it; but for all that appeared, might be taken to describe a tract altogether independent of the town, and indeed such a tract should have been, for the patent only professed to grant land in the "township,' of Newark (now called Niagara), and to grant 35 acres more or less. But laying down a tract according to the courses and distances given in the patent, which were all expressed absolutely, and without any qualification of "more or less," or any reference to the town, or any street in it, the description would embrace about 70 acres instead of 35, and would cover about two-thirds of the width of Queen-street, the principal street in the town of Niagara along a distance of 40 chains, as laid down in the public plan or survey of the town of Newark (now called Niagara), made long before Mr. Smith's patent was issued, and which map was then in the office under Mr. Smith's charge, as surveyor general, and was the regular official plan, according to which the crown grants were made. And the patent, according to the lines and courses mentioned in it, would cut off also, and include in the patent, six entire town lots, and part of six others, at least of what are laid down in the old office plan of the town of Newark as town lots. On this plan lots 83, 84, 85, and 86 were represented as forming four town lots of the town, of the same size as the other lots, having their north front on Queen street, and fronting to the north and west on two other streets of the town. A dotted line appeared on this official map of Niagara, proved by a clerk from the surveyor general's office to have been added by the late Mr. Chewett, who was for many years senior surveyor and draftsman in the department, which line shewed to what extent the patent to Mr. Smith would interfere with the town, cutting off, it appeared, the whole of the lots 84 and 85, which the lessor of the plaintiff claimed in this action, and a part of 86. It would cut off also not only two-thirds of the breadth of Queen street for a distance of 40 chains, but would take in the whole street along the north front of town lot 83 and part of 85, and would cut off part of three other streets laid down in the town plan.

The town lots contain about one acre each. It was proved that the defendant, in making a sale of land as part of Mr. Smith's tract, pointed out to the vendee, Queen street as his boundary, not claiming to interfere with it; also, that on the 11th of December, 1850, he wrote to the public agent for crown lands in such terms as shewed that he considered

these lots, 84, 85 and 86, as adjoining his lands and forming no part of them, and also that he bid for them at the same public sale at which the lessor of the plaintiff purchased. It was also proved that, upon a transaction which took place between the defendant and the government many years ago, the defendant surrendered to the ordnance department forty acres, as being held by him under this patent, and received other lands in exchange for them, which shews how large an overplus the lines and courses which Mr. Smith caused to be inserted in the patent to himself would embrace beyond the thirty-five acres mentioned in that patent, and this without interfering with the lots now claimed by the lessor of the plaintiff under his late purchase from the crown, and without indeed interfering with the original town plot to any extent.

A clerk from the Surveyor General's office was examined as a witness at the trial, and he swore that the plan he produced was used in the office as the original map of the town of Newark or Niagara (the name having been changed after the patent issued), on which plan town lots, 83, 84, 85 and 86, were exhibited as forming a square block in the town, at the western end of Queen street, and on its southern side, having streets of the town on each side of the square block, which, like the other blocks in the town, is composed of four town lots, of one acre each. Each lot in this block had the letter R written across it on the plan, which was explained to mean "Reserve," and across the whole block is written the note, "Reserved, if necessary to complete this town, which was organized the 21st of June, 1791, in the proportion of one-seventh," which was explained to mean that those lots were reserved as clergy reserves, and to be specified in patents as such, if necessary to make up the proportion of one-seventh for clergy reserves in respect to the lands granted as town lots.

And upon the trial three crown patents were produced, bearing date in 1796, and before the date of Mr. Smith's patent, in each of which patents is contained this reservation,—"Now know ye that *in the said town of Newark* we have directed an allotment or appropriation of land, being in proportion of one to seven of the land hereby granted to the said (grantee), to be made in a square, containing four acres, compreprehending lots Nos. 83, 84, 85, and 86, lying at the the north-west angle of the town, and west of Mississagua Point, and containing, &c." (stating the quantity of land so reserved).

There was also produced a patent, made on the 6th of July, 1797, being the year after Mr. Smith's patent, in which there is a reservation for a protestant clergy made in lots 83, 84, 85, and 86, not stating

whether those lots were in the town or township, but doubtless referring to the same lots, and thus treating them as lands which remained at the disposal of the government, and which they were then at liberty to reserve for the clergy, though this was nearly a year after Mr. Smith had received his patent, and it is to be considered that it was his duty, as surveyor general at that time, to furnish the descriptions for all these patents.

Mr. Jones, a clerk from the surveyor general's office, proved that these lots, 83, 84, 85, and 86, had always been treated and considered by the government as being a part of the town of Niagara as much as any other in the town, and as such had been lately advertised and sold as clergy reserve lots in the *town of Niagara*. It was also explained that if the patent to Mr. Smith could not extend so as to interfere with Queen street, the principal street in the town, then the line running southerly 7 chains 32 links from the western end of the 40 chains' distance mentioned in the patent would not reach across the whole square now in question, but would leave some part of the southern end of lot 85 not embraced in the patent, even if it could otherwise take in those lots, and this the plaintiff contended would of itself entitle him to a verdict.

Another witness (Mr. Miller) was examined, who swore that he had lived in Niagara since 1802: that he had always understood the limits of the town to be as laid down in the public plan produced: that he had been deputy registrar for ten years, and had always known the lots now in question, and the other lots, numbered in the plan as town lots, as being part of the town.

It was shewn that, by a public notice of the government these lots, together with eight other lots, were advertized for sale as clergy reserve lots in the town of Niagara.

On this evidence it was contended on the part of the plaintiff that Mr. Smith's patent, granting only land in the *township*, could not cover any part of the town.

And, 2ndly, that even if it could otherwise embrace the lots in question laid down as part of the town, yet that they having been taken into specification (as it is called) as clergy reserves, in patents issued before this patent to Mr. Smith, such parts as were so reserved solemnly under the great seal became set apart, under the British statute 31 Geo. III. ch. 31, for the support of the clergy, and could not be granted afterwards by the government, or in any manner absolutely disposed of, until the late imperial statutes were passed, which have authorised the

sale of clergy reserves, and under which the crown had disposed of these lots to the lessor of the plaintiff.

These points were agseed to be submitted to the opinion of this court, and a verdict was taken at the trial, by consent for the plaintiff.

Vankoughnet, Q. C., for the plaintiff. *Cameron, Q. C.*, for the defendant.

ROBINSON, C. J., delivered the judgment of the court.

As the plaintiff sues in this action for the whole of lots 84, 85 and 86, in the town of Niagara, and the defendant claims title only to the thirty-five acres described in the patent to Mr. Smith,—and admits the plaintiff's right to part of the three town lots above named, under his purchase from the government, which is not covered by this patent (if there be any such part),—it is clear that the plaintiff is entitled to a verdict, because it was proved on the trial, and seems quite certain, that there is a portion of town lot 86 which the patent does not embrace, giving the fullest effect to the description, by carrying all the lines out to the distances expressed. But, in order to prevent further litigation, both parties desire to know the opinion of the court upon the point whether this grant to Mr. Smith, under which the present defendant claims, can be allowed to interfere with any parts of the lots 84, 85, and 86; or whether, notwithstanding the issuing of that patent, the title to these lots, as forming part of the town of Niagara, did not still continue in the crown, until they were sold to the present lessor of the plaintiff as part of the lands that had been reserved for a protestant clergy.

We are of opinion that the patent to Mr. Smith (afterwards Sir David Smith) cannot be held to have vested in him any land that did not at that time form part of the township of Newark, distinct from the town. It is clear that it was not intended to encroach upon what was then known as the town. Mr. Smith had only applied to the government to grant or confirm to him something which his father had asked for, and which he describes as a small farm "*adjoining the town of Newark.*" He does not pretend that his father was to have had part of the town for a farm; and in this same petition he declares that he has abandoned a portion of what his father had occupied because it fell within the within the military reservation, and he asked only for a grant of what land there might be lying between the military reservation, *and the town*, which he said would contain about twenty-five or thirty acres.

Mr. Smith was at that time Surveyor General, and as such was in

possession of the most authentic information as to the limits of the town and the extent of land between that and the military reservation. It rested with him to give the government precise information upon that point. The town had been laid out long before that, and it is fair to assume that he was well aware of its limits, and did not speak without knowlege of the fact when he described the invervening tract as containing about twenty-five or thirty acres. What is now contended for, it seems, would have the effect of making the patent made out in pursuance of this petition (and for which patent it was the duty of Mr. Smith himself, as Surveyor General, to furnish the description) cover nearly, if not quite, seventy acres; and it further appears that the defendant, who purchased from Mr. Smith his interest under his patent, has actually had his title to 40 acres recognized already, which is considerably more than Mr. Smith represented himself to be applying for. What his assignee now seeks to hold against the vendee of the crown, by laying claim to what appears to have been always understood to form part of the town, would be so much in addition to these 40 acres. It need hardly be said that, under such circumstances, there is the least possible claim to be urged by the party claiming under this patent to anything which the description in the patent does not strictly and inevitably cover.

It is remarkable that, the government having merely assented to the petition for a grant of the land "*between the military reserve and the town*," the description which was framed for carrying their order into effect should have forborne all mention of the land being intended to be the tract between the military reserve *and the town*, and should make no more reference to the town than if no such town existed; and the patent goes beyond the petition in calling the contents of the tract thirty-five acres, more or less, instead of from twenty-five to thirty. It begins at the northwest angle of the military reserve, which no doubt was a fixed and known point, and then lays down courses and distances as if they were to be carried out absolutely and without any regard to the boundaries of the town; and under this patent a claim is set up which, if it can be supported, would give to Mr. Smith and his assignee seventy acres instead of thirty-five, and would cut off a considerable portion of the town, including parts of several streets. We think nothing passed under this patent which at the time formed part of the town; because the patent grants thirty-five acres, more or less, in the *township* of Newark, and we know that the town and township of Newark or Niagara are distinct localities, and were so treated by the

legislature and by the government, though the town may have formed part of the township—that is, may have been taken out of it. The 28th clause of the statute of 1798, for the division of the province, shews this; for it provides that the town and township of Newark shall be thenceforth declared and called the town and township of Niagara, respectively; and the patents put in upon the trial, of earlier dates than that to Mr. Smith, shew that the town and township were treated by the government as distinct divisions of territory. Then, this being so, the principal feature or term in the description is, that the land granted is "in the township of Newark"—in other words, out of the town; and that so far controls the description, that the latter, being subordinate to this principal feature of the grant, cannot have the effect of making land pass by the patent, which, properly speaking, is not land in the township but in the town. The case in this court of *Doe ex dem. Stuart* v. *Forsyth*, 1 U. C. R. 824, was decided on this principle, and we have acted on it in other cases: it is in accordance with what is to be found in English books of the highest authority. If this description had commenced by granting all that parcel or tract of land embraced within the lines of limits expressed in the patent, and, after laying down a certain tract capable of being traced on the ground, had added by way of further description the words "being land in the township of Newark;" whereas the land thus described formed in truth part of the town, then the tract itself, as laid down on the ground, and described by metes and bounds, would have been the principal feature or term of the grant, and the other would have been mere matter of description, and of erroneous description, in calling the land so granted part of the township instead of part of the town. But here the patent begins by announcing a grant of land in the township, and then, in proceeding to describe it, includes land in the town, which must be a false description of that which had been granted. It is the same thing in effect as if the crown should make a patent to A of lot 1, in the first concession of a township, and then proceed to describe it by such courses and distances as would embrace a part of lot 2, or would cross into the second concession; in which case the lot intended to be granted would pass, and the incorrect description would be discarded. In this case, from the peculiar terms of the patent and the nature of the grant intended to be made, a difficulty may be found to arise in defining the limitation of the grant, when is it determined that none of the lines can consistently with the patent be carried over the boundary of the town; but we have nothing now to do with the question whether

the patent grants any particular tract with requisite certainty. It is only necessary, as between these parties, to determine whether any part of the three town lots in question were vested in Mr. Smith by that patent, and I have already said that we think they were not. If the Surveyor General had made his patent correspond with his petition, and had expressed that what was intended to be granted to him was only the land between the reserve and the town, and bounded on the south and west by the small creek and by the lake, then it would have been clear enough what was meant, and the erroneous lines could have created no embarrassment.

It is very material also, as was contended on the trial, that the lots now claimed by the defendant, as being included in Mr. Smith's patent, had not only been laid down on the office map of Niagara as part of the town of Niagara so early as 1792, four years before this patent issued, but they had been actually reserved by the government as clergy reserves under the British statute 31 Geo. III. chap. 31, and were so marked on the plan in the surveyor general's office—the very plan, as we are at liberty to assume, from which the description in question must have been framed. And it was further shewn that in two patents which had been issued before that one to Mr. Smith was made, parts of the same town lots, 84, 85, and 86, were specified as the lands reserved for the clergy, in respect of the land granted by those patents.

This is not only a declaration under the great seal, in accordance with the office plan, that the lots at that time formed part of the town, but the effect of the reservation being thus made in these patents was to set them apart conclusively, as against the crown, for clergy reserves, and to make them unalienable thenceforward by the mere act of the executive government. The 36th and 37th clauses of that statute would be rendered nugatory, if after any particular lot had been thus set apart by patent, as being the proportion of clergy reserves which it was indispensable to the validity of the grant should be specified in the patent, it would be competent to the government to grant the same to an individuel, as if it were notwithstanding vacant and grantable. It would be indirectly making the patent itself void; or, if the alienation could be effectual, it would in effect amount *pro tanto* to a repeal of the British statute. It has been always well understood that until the Imperial parliament some years ago made provision for selling the clergy reserves and applying the proceeds to religious purposes, no land which had thus been set apart, and specified in letters patent as specifically reserved for the clergy, could be treated as land grantable in

fee to individuals; and in justice to Mr. Smith it ought to be assumed that he could never have imagined, or intended, that he was including in his description of lands to be granted to himself the very lots which he must well have known had been by the solemn act of the government, in which he had himself participated, set apart for the clergy. This is an objection to the defendant's title, independent of the mere fact of these lots forming part of the town, and it appears to us to be insurmountable.

Our opinion is, that no land can be held to have passed under the patent which formed a part of the town plot, and we think it is evident that there is no appearance even of hardship in this decision.

Postea to the plaintiff.*

DOE STEVENS ET AL. V CLEMENT.

Statute passed reversing attainder except as to lands already forfeited and sold—Effect of, on proof required from parties claiming under the traitor—Mere date of will being thirty years old, not sufficient to dispense with proof—13 & 14 *Vic. ch.* 63.

A statute was passed reversing the attainder of A. S., and taking away the forfeiture wrought thereby, so far as it might affect such portions of his estate as had not been already declared forfeited, and been sold under authority of law, and vesting such estate in those who could claim it if he had not been attainted; provided always, that nothing in the act contained should affect any property sold or conveyed by the Commissioners of Forfeited Estates, or any public officer acting for the Crown in that behalf, but that such property should remain as if the act had not been passed. In the preamble it was recited that a part of the estate had been taken upon inquisition, and seized by the Crown.

Held, that the plaintiffs claiming as devisees of A. S. must shew, as part of their case in the first instance, that the lands claimed were no part of those forfeited and sold.

The mere fact of the date of a will being thirty years old is not sufficient, under all circumstances, to prove that that is the real age of the writing, even if it comes from the proper custody but some proof must be given of a concurrent possession of the property consistent with it, or of the existence of the will, for thirty years.

(Q. B., E. T., 15 Vic.)

Ejectment for four hundred and fifty acres in Whitby.

On the 10th of July, 1801, the crown granted this land by patent to Aaron Stevens. He was convicted of high treason during the war States of America, in 1814, and was executed.

The statute of Upper Canada 59 Geo. III. ch. 12, made provision for vesting in commissioners all such estates of traitors as had been or

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* See *Doe dem. Gildersleeve* v. *Kennedy*, 5 U. C. R. 402.

might hereafter be attained by inquisition as forfeited to his Majesty, and for satisfying all debts and claims thereupon, and appropriating the remainder of what this might produce to certain public purposes.

In 1851, an act was passed (14 & 15 Vic. ch. 170) which recites that Aaron Stevens had been lawfully convicted and attainted of high treason, and had suffered capital punishment; whereby his real property had become forfeited, and had been in part taken upon inquisition found in that behalf, and seized into the hands of the crown: that a portion of his estates was not found upon inquisition, or declared forfeited by reason of his attainder, or seized by the crown: that her Majesty had been pleased to signify her pleasure that his attainder might be reversed, the corruption of blood consequent thereon taken away, and no further forfeiture enforced against such of his estates as had not already been forfeited and disposed of: and it was thereby enacted, that the attainder of Aaron Stevens should be reversed; and the corruption of blood and forfeiture wrought by the said attainder are thereby avoided and taken away, "*so far as the same shall or may in anywise affect such portions of the estate of him the said Stevens, as have not already been declared forfeited, and been sold under authority of law;* and such portions of the estate of the said Stevens, *not already forfeited and sold as aforesaid,*" are thereby vested in the same persons and parties, whether claiming by will or otherwise, in the same manner and with the same and no other effect or consequence as to the rights of third parties, as if he had died without being so attainted: "provided always, nevertheless," the act says, "that nothing herein contained shall extend or be construed to extend to or affect any goods or chattels, lands or tenements, actually sold or conveyed by the said Commissioners of Forfeited Estates under the said act or otherwise, or by any public officer or minister of justice acting on behalf of the crown in that behalf; but all such goods and chattels, lands and tenements, shall belong to the same parties, and be dealt with in all respects as if this act had not been passed."

The last clause enacts that the act and the reversal of attainder referred to, shall be construed and taken in the most large and beneficial sense and manner in favour of the heirs and assigneess of the said Aaron Stevens.

This action of ejectment was brought on the several demises of a great number of persons, children and grand-children of Aaron Stevens, and the husbands of some of them; all claiming an interest under a will of Aaron Stevens, alleged to have been made on the 18th of

September, 1813, whereby he devised to his sons, Nicholas, Adam Chrysler, William, Joseph, Samuel, Daniel and Alexander, and to his daughters, Margaret, Catharine, Mary Anne, Elizabeth, and one "unnamed" admitted to be Jane, their heirs and assigns forever, all his real and personal property, to be equally divided among them; and directed that if any of them should die before his decease, then his or her share to be equally divided among the survivors, after just and lawful debts are paid.

He appointed his wife and three other persons to be executors of his will, one of whom was John Chrysler, his wife's brother.

At the trial, before Draper, J., at Toronto, the will was produced, and one of the sons of Stevens swore that, about eighteen years ago, John Chrysler, who had since died, gave it to him, telling him his father had left it with him; that he gave the will to a brother, who kept it till he died, when it got into the possession of another brother; and the latter swore that he kept it until the time of the trial. There were three subscribing witnesses, who had all died, and the proof of the signature of any of them was very defective: indeed no witness gave an opinion as to any of the signatures but one, that of the subscribing witness John Daly; and it was on account of the unsatisfactory nature of his evidence that it was attempted to rely on the will as a document proving itself. The learned judge, however, thought that there was evidence sufficient, if believed, to prove the signature of the subscribing witness Daly.

It was sworn that Nicholas Stevens was the eldest son and heir of Aaron Stevens, though some doubts were thrown upon his legitimacy, as being born before the marriage of his parents; but on that point there was no precise testimony.

The defendant claimed under a deed made to him by this Nicholas Stevens, of the land now in question, on the 21st of November, 1831, in fee, registered on the 2nd of December, 1831, which was produced and proved.

The defendant's council contended that this deed, being registered, must be allowed to prevail against the will, which had not been registered; that such is the effect of the late Registry Act (13 & 14 Vic., ch. 63), although the title had not been before a registered title.

And he relied upon the statute which was put in evidence, reversing the attainder of Aaron Stevens, as making it indispensable, before any persons could make title as devisees under his will, that they should shew that the estate which they claimed had not been forfeited under

his attainder and sold; for that the act, by its very terms, is only made to affect such unsold lands.

The learned judge overruled the objection to the devisees' title grounded on the non-registry of the will; but, with consent of the parties, directed a verdict for the defendant, subject to the opinion of the court on the effect of the statute, who were either to direct a general verdict for the plaintiffs, or a verdict for the plaintiffs upon such demise or demises as they should think right on the evidence, in case of the lessor of the plaintiffs, or any of them, being found entitled to recover.

Bell obtained a rule *nisi* to set aside the verdict for the defendant, and enter a verdict for the plaintiffs generally, or on such demises as the court might think right on the evidence; or for a new trial on affidavits. He cited *Simpson* v. *Ready*, 12 M. & W. 736; *The Mayor of Salford* v. *Ackers*, 16 M. & W. 85.

Cameron, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The lessors of the plaintiff made title under the will, which it was objected was not legally proved. The learned judge thought there was some evidence of its execution to go to the jury, but by consent the verdict was taken for the defendant at the trial, subject to our opinion. We cannot say whether the jury believed the evidence respecting the will, nor whether it satisfied them that the will was duly executed. We do not find that it was so proved as to leave no question for the jury on that point. Indeed it can hardly be said that there was evidence given sufficient to convince the jury of the handwriting of any one of the three witnesses to the will, though, if the jury had pronounced upon it, such as it was, we might not have felt it necessary to interfere.

It was further objected that the other two subscribing witnesses were not accounted for, and that is true. When the will is thirty years old that is not necessary, for the presumption is that they are dead, but I doubt whether the mere fact of the date being thirty years old is to be taken as proof that that is the real age of the writing under all circumstances, for if it were, then it would be easy to commit successful forgeries; the chief difficulty would be got rid of by merely ante-dating the instrument.

There is no proof here of any one having seen this will more than eithteen years ago. And, under such circumstances, admitting that the will came from the proper custody, I cannot say that, as a matter of course, it proved itself, there being no concurrent possession of the

property for the thirty years consistent with it; nor any proof of its existence going further back than eighteen years.

But on the other, and main ground in the case, we concur in the opinion expressed at Nisi Prius—that the express words of the statute 14 & 15 Vic., ch. 170, make it necessary that the plaintiffs, claiming as devisees of the attainted traitor, should shew as part of their case in the first instance that the lands they are claiming form no part of his real estate that has been forfeited and sold; that they have not been returned by the commissioners of forfeited estates as having been found by inquisition to have been forfeited to His Majesty, and sold as such by the commissioners.

Though this is negative evidence, it is a negative admitting of the plainest and most easy proof, because the Forfeited Estates Act provided for making and preserving records of all estates that had been so dealt with; and this is no proviso or exception occurring either in the same or a subsequent clause to that which relieves from the forfeiture, but the relief itself is only afforded *so far as regards* estates not forfeited and sold; therefore, in order to bring the case within the act, it is necessary to shew that the estate now in question is such an estate.

No evidence whatever was offered on that point, and we think therefore the verdict was rightly entered for the defendant.

Rule discharged.

THE CANADA COMPANY V. HOWARD, TREASURER OF THE UNITED COUNTIES OF YORK, ONTARIO AND PEEL.

Non-resident proprietors, how assessed for statute labour—18 & 14 *Vic., ch.* 67.

Where a non-resident owns several lots of land in the same townships or county he is chargeable on account of statute labour with the rate of commutation estimated with reference to the value of each lot separately, and cannot claim to have been rated according to their aggregate value.

(Q. B., E. T., 15 Vic.)

In this case *Cameron, Q. C.*, obtained a rule *nisi*, ordering the Treasurer to shew cause why a mandamus should not issue, commanding him to receive from the Canada Company 12*l.* 7*s.* 6*d.*, being the amount of commutation for statute labour tax on the lands of the Canada Company in these united counties.

The application was founded on an affidavit of the commissioner of the Canada Company, stating that the treasurer had demanded from

him 70*l.* 11*s.* 2½*d.*, for taxes on the lands of the Company in these three united counties: that this sum included 35*l.* 5*s.* 9*d.*, charged against the Company's lands in the several townships of these counties for commutation of statute labour: that this commutation was charged on the value of each separate lot in the respective townships, instead of being charged on the aggregate value of all the lands of the Company in each of the several townships; and that the excess of taxation created thereby amounts to 22*l.* 18*s.* 3*d.*; that the treasurer was well aware that the land so charged belonged to the Canada Company, and made the charge against the Company in respect of them: that he had refused to receive the amount that would be due if charged upon the aggregate value of the lands of the Company in each township, and insisted upon the commutation tax being paid upon the value of each lot or parcel of land as valued separately.

A similar rule, on the same ground, had been granted, to shew cause why a mandamus should not issue to the treasurer of the county of Kent, in order to correct an alleged overcharge of the same kind.

Vankoughnet, Q. C., and *C. Gamble*, shewed cause. The question brought up by these applications was, whether, under the Assessment Act. 13 & 14 Vic., ch. 67, the lands of a non-resident owning several lots or parcels of land in a township, are necessarily chargeable on account of statute labour with the rate of commutation estimated with reference to the value of each lot or parcel of land separately, as they would be in the case of a resident or non-resident proprietor owning but one lot of land in the township; or whether a non-resident proprietor having declared himself to be the owner, or being otherwise known by the treasurer of the county to be the owner of several lots in any one township, can insist upon their being rated for statute labour, according to the scale laid down in the 22nd clause of the statute, upon an estimate of their aggregate value.

ROBINSON, C. J., delivered the judgment of the court.

The 7th, 8th 9th, 17th, 20th, 22nd, 23rd and 32nd clauses are those which bear upon this question, and having considered their language, and examined all other parts of the statute, we think it is clear—whatever may be conjectured to have been the intention of the legislature—that the scale of charge laid down in the 22nd clause, according to which the assessed resident inhabitants of a township are to be rated to a certain number of days' statute labour, increasing with the amount

of their assessed property, but with the ratio of increase diminishing as the scale of value increases, can only be applied to the cases of parties assessed upon the assessment rolls; in other words, to resident proprietors.

In regard to non-resident owners of lands in any township, the act admits of no other course for rating them in respect of statute labour than by following out the provisions of the 32nd clause, which makes the tax in their case a charge against the several parcels of land which they may own, and not against themselves in respect of their lands. Then, each distinct lot or parcel of land being required in such cases to be rated by itself according to its value, and without regard to its owner, whose name cannot appear on the list, we see no authority for making an aggregate estimate of their value, in consequence of its being shewn, apart from the assessment roll, that they do in fact all belong to one proprietor. They must all be treated, we think, as if they belonged to different proprietors, and must contribute according to the valuation of each parcel. The effect of this will be, that if A., living in the county of York, owns one lot of land in each of six several townships of the county of Middlesex, or six lots in one township of that county, his lots will in either case be rated for statute labour according to their valuation; and the act bears no more hardly upon him in the one case than in the other. Where any lot or parcel of land of a non-resident proprietor in a certain township is valued at any of the larger sums mentioned in the twenty-second clause, that single property will have the benefit of the graduated scale given in that clause, because it is only according to that scale that the charge against the lot can be made, and so the proprietor in such a case gets in effect the benefit of the reduced rate of charge in proportion to the value of the property.

But we see no means, without some officer stepping out of his line of duty and disregarding the provisions of the act, by which the non-resident proprietor can obtain the same benefit in effect, in regard to several lots of land which he may own in the same township. The twenty-third and thirty-second clauses taken together, in connection with preceding clauses of the act, seem to preclude the township or county officers from paying any regard to the consideration of the same absent party having to pay the rate in respect to several lots of land, and on that account altering the rate at which *each lot* is chargeable under the thirty-second clause; the intention of the statute being clear that in regard to the lands of non-residents the charge is to be made on

the roll against the land itself, and not against the proprietor, of whom no mention is to be made or notice taken on the assessment roll. In our opinion, we must discharge this rule with costs.

Inconveniences may be suggested that will arise from the statute being construed as we think it must be, looking at the plain signification of its language—one was stated indeed by one of my brothers during the argument. A proprietor of land in one municipality may reside in another, and finding his land likely to be saleable in village lots, may divide fifty or one hundred acres accordingly into small lots; if each of these must be rated separately, as if they belonged to different proprietors, the amount of statute labour for which he would be rated would be monstrous, and so it might be, and the act in this respect might be found oppressive—but that will not give us power to deny to the statute its plain operation and effect. The legislature must be looked to for correcting any injudicious provisions.

Rule discharged.

DOE DEM. STATA V. SMITH ET AL.

DOE DEM. SUMMERS V. MCDONELL.

Sale of lands for taxes—Lands returned in June, 1820, liable for that year—59 Geo. III. ch. 7; 6 Geo. IV. ch. 7 9 Geo. IV. ch. 8.

Under 59 Geo. III. ch. 7, lands returned in the surveyor general's schedule in June, 1820, were liable to have taxes charged against them on the 1st of July following, which taxes for the first year were to be then assessed for 1820, so that, if not paid, there would be eight years' taxes in arrear on the 1st of January 1828.

Such lands having been sold under a warrant which described the taxes on them as being in arrear from *the first of July*, 1820, *to the first of July*, 1828, the sale was upheld; for eight years' taxes being really due, the mistake in the time of commencement was unimportant, and could not vitiate the warrant.

(Q. B., E. T., 15 Vic.)

At the trial, before McLean, J., at Cornwall, the plaintiffs title *prima facie* was not objected to in either case; but the defendants claimed the land under a purchase made at sheriff's sale for taxes.

In Stata's case a patent had issued for the land in December, 1802, to the plaintiff's ancestor.

On the 24th of June the surveyor general returned the land in his schedule as described; and at the Quarter Sessions, on hte 17th of August, 1829, the treasurer of the Eastern District returned this, with other lands, as being in arrear for taxes eight years up to the 1st of

July, 1828, and therefore liable to sale. In September, 1829, warrants to sell were issued by the clerk of the peace, and on the 6th of July, 1830, the land in question was made to Simon Fraser, and conveyed to him in January, 1831. The defendants claimed by purchase from a person who afterwards bought from Fraser.

No other objection was taken to the defendants' title than this, that the arrear of taxes for which the land was sold was claimed as being in arrear from the 1*st of July*, 1820, *to the* 1*st of July*, 1828, whereas under the assessment law of 1819 the fiscal year begins on the 1st of January in each year; and the writ should have been for eight years' taxes, ending on the 1st of January, 1829, commencing the 1st of January, 1821, for that on the 1st of July, 1828, only seven and a half years' taxes were due, wherefore the land was returned for sale before there were eight years' taxes in arrear, which the law does not authorise.

The same question was brought up in the case of *Doe dem. Summers* v. *McDonell.*

A verdict was given for the defendant in each case, with leave reserved to the plaintiff to move to enter a verdict in his favour.

Vankoughnet, Q. C., obtained a rule *nisi* accordingly, and in the alternative for a new trial on the law and evidence, and for misdirection.

McDonald, Q. C., shewed cause.

ROBINSON, C. J.—We are all of opinion that there is no good ground for the exception. Under the 13th clause of the statute 59 Geo. III. ch 7, the lands returned in the Surveyor General's schedule in June, 1820, would on the 1st of July, 1820, become chargeable with that year's rates, and therefore in July, 1828, would be eight years in arrear, as these were assumed to be—no taxes having been paid in the meantime. The statute 9 Geo. IV. ch. 3, sec. 9, extending the time for making the treasurer's return to July, 1829, makes it quite clear that this was done as an act of indulgence to the parties; and when this clause is considered in connection with the 6th clause of 6 Geo. IV. ch. 7, we cannot fail to see a plain legislative declaration that, according to the intention and effect of the first act 59 Geo. III. ch. 7, eight years' taxes would be due on the 1st of July, 1828, on all lands included in the surveyor general's first return made under the last mentioned statute.

So far as we have observed, in the many cases brought before us of titles acquired under sales for taxes, the law was so construed by the proper authorities in all the districts, and we think there can be no

question that in that respect the law has been rightly acted upon. The 6th clause of 6 Geo. IV. ch. 7, must govern the question, and it shews plainly that, although the fiscal year may have begun on the first of January, yet the taxes for that year were not to attach in respect to absentee lands before the 1st of July, because, as regarded them, certain facts were to be ascertained and formalities required, for which there was no occasion in the case of resident proprietors; but to hold that on that account there was to be no charge made for taxes against such lands in respect to any time before the *1st of January*, 1821, would be contrary to the terms and evident intention of the 6th clause of 6 Geo. IV. If the legislature meant that, the provision contained in the ninth clause of 9 Geo. IV. ch. 3, would have been unnecessary.

DRAPER, J.—Confining my attention strictly to the provisions of this act (59 Geo. III. ch. 7), I certainly should arrive at the conclusion that the fiscal year for rates, taxes, or assessments, made or imposed under its authority, commences in January and ends in December in each year; or, at all events, that it commences on the first Monday in January, and ends accordingly; and I do not see any sound reason for holding that the fiscal year for lands unoccupied and not on the assessment roll, but included in the surveyor general's schedule, should begin and end at a different period from that for lands unoccupied and on the assessment roll.

I do not think it by any means necessarily follows from the language of the act, that the fiscal year for lands only appearing in the surveyor general's schedule should begin on the 1st day of July; and notwithstanding the words "from the time they are returned in the said schedule," I am still less inclined to think that the fiscal year for such lands commences on the date of such return, which may be, and probably is, different for different districts; and also, probably, is different in different years. Taking the sentence together, that the lands described in the schedule as granted or let to lease "shall, from the time they are returned in the said schedule, be assessed and charged to the payment of the rates or taxes imposed by this act in the respective districts in which they are situated, and not elsewhere." I rather draw the inference, that from the time of the return they shall be charged with the taxes for the current year, though a large part of that year was antecedent to the date of the schedule, just as every occupant found in possession when the assessor goes round, is assessed, not from the date of the assessment actually made, nor from the day on which he entered

into possession, but from the commencement of the year for which the assessment is made. The "rates or taxes imposed by this act" are for a year current when the schedule is returned by the surveyor general; and it does not appear to me a forced construction of the language to give it a retrospective action to that extent. Looking no farther than the act, it appears to me the sound construction.

The very next statute passed (59 Geo. III. ch. 8) appears to me to confirm this opinion. By its provisions (sec. 8) every lot or parcel of land subject to be rated and assessed, but which is not included in the assessment roll, is, from and after the first Monday in March, 1820, rated at one-eighth of a penny per acre for the improvement of the public highways.

By section 4 the treasurer is authorised to receive these rates; and there is a similar power of distraining for them at a future period "if no distress can be found at the time such rates are payable," as is contained in section 13 of the preceding act. Section 5 is a repetition of section 15 of the former act; and section 7 provides that in *the account* to be kept under sec. 14 of the preceding act the treasurer shall charge or credit each lot with the road tax and payments thereof, as well as those accruing under the former act, thus blending into one the accounts of the two taxes.

I think it impossible to hold that a separate fiscal year, commencing on the first Monday in March, can be deemed created for the road tax on lands not on the assessment roll. If it were, then such lands would not be known under the former act as liable to rates and assessments until the surveyor general's schedule was returned; the road tax would either commence from the 1st of March next before the time of the lands being returned in that schedule, or from the first of March after—in either case making two distinct times of the commencement of the fiscal year for the assessments and for the road tax, whereas I think the legislature intended only one fiscal year for all purposes, and that its commencement and conclusion is governed by the time for assessing ratable property on the rolls, and imposing rates and taxes according to the provisions of ch. 7, as to parties resident in the various localities.

It is not until we look at 6 Geo. IV. ch. 7, that any difficulty as to the commencement of the fiscal year in respect to taxes of any kind on land not on the assessment roll, but in the surveyor generals schedule, appears; and on looking at the 6th section, it must be read as altered by the 9th Geo. IV. ch. 3, sec. 9, and then it will be in substance as follows: that the treasurer shall, at or before the Court of General

Quarter Sessions which shall ensue next after the 1st of July, 1829, present to the justices *an account of all lands* on which the *assessments*, rates or taxes imposed by the several acts. or any part thereof, shall have been in arrear for the space of eight years, specifying the land by lot, &c. as it appears in the schedule furnished by the surveyor general, and specifying the amount due for assessments thereon, and shall make like return at the same court in each succeeding year.

I do not see that any difference as to the commencement of the fiscal year is made by this enactment, which is the only one in either of the two acts last referred to that affects the question.

When the time arrived (1st of July, 1829) the treasurers might, so far as I can see, have made their returns up to the end of the last fiscal year,—viz. up to the 31st of December, 1828. The words, "shall have been in arrear for the space of eight years," would no doubt exclude from such return all lands upon which taxes had not been in arrear as much as eight years, but not lands upon which taxes had been in arrear more than eight years—*i. e.* nine, counting from the beginning of the fiscal year 1820.

But, if my view be correct, the taxes for which this lot was sold accrued due at the end of the fiscal year 1827; and the error in the treasurer's account, that the eight years' taxes accrued due on the 1st of July, 1828, would be, I think, unimportant. It might be rejected, as the fact would be that the eight years' taxes had accrued earlier. Still less should an error of this description affect the sale, when before the date of making up the account, another year had become in arrear. The substance of the treasurer's account is that eight years' taxes are in arrear. The law does not require in terms that the day on which the eight years expired should be stated This is confirmed by the form of the writ to sell given in the schedule to the 6th Geo. IV., which recites that by the account rendered by the treasurer it appears that the assessments, or some part thereof, which are imposed upon lands by the several statutes of this province, have been suffered to remain in arrear beyond the space of eight years upon the lots or parcels of land hereinafter mentioned; and that the said lots or parcels of land stand respectively charged with the sums herein set forth—that is to say," (setting out the lots and the "sums charged against the same in the treasurer's accounts, so remaining in arrear *up to the expiration of the last year before such account was rendered.*")

Upon the whole, I think the rule should be discharged.

BURNS, J.—The first question, as it appears to me, is to ascertain what the construction of the act is as to the computation of time for commencement of the taxes on lands not returned to the assessors, and not appearing on the assessment roll. In the case of the Eastern district it seems the treasurer adopted the 1st of July, 1820, as the time from which the taxes were to commence upon such lands as were liable to the rates, and which had not been returned on the assessment rolls; and the justices of the district took the same view, when they ordered and directed warrants for the sale of such lands after the expiration of eight years. It is now contended before us that lands returned on or before the 1st of July, 1820, and on and before the 1st of July, in every year thereafter, are not liable to be rated or taxed until the following year. I am of opinion that neither these views is the proper construction to put upon the statute 59 Geo. III. ch. 7.

The first section of the act declares that after the first Monday in January, 1820, and for every subsequent year, every acre of arable, pasture or meadow land shall be rated at 20*s.*; and every acre of uncultivated land shall be rated at 4*s.*; and the 4th section declares that all lands shall be considered as ratable property which are holden in fee simple, or promise of a fee simple by land-board certificate, order of council, or certificate of any governor of Canada, or by lease. Under the third section it is declared to be the duty of the assessors annually, between the first Monday in February and the sitting of the quarter sessions then next ensuing, to take and receive from any ratable inhabitant of the township a list of his ratable property, and to return a list of the whole to the said quarter sessions. Now, supposing that the assessor should go round the township in the latter end of March, and should find that persons had obtained patents for their lands but a few days before his calling upon them, and had settled on their lots, would such persons be liable for that year's taxes? I do not think that it admits of any doubt that such persons would be liable for the year's taxes. The thirteenth section declares that the lands described in the schedule returned by the surveyor general shall, from the time they are returned in the said schedule, be assessed and charged. I do not understand that expression to mean that such lands begin to pay the yearly tax from the date of such return, because, if so, then the inconvenience which was stated by the plaintiff's counsel in argument would follow, that there might be one time of commencement for taxation in one township, and another for another township, and there might even be different

times in succeeding years for the same township, according to the dates of the yearly returns of the surveyor general. The limitation of the time to the 1st of July in each year for the surveyor general to make such returns, I do not understand to be for the purpose of rendering the lands liable to be taxed in the following year, but, on the contrary, that all the lands so returned up to the 1st of July would be liable to the the current rates of that year upon the schedule being returned. The expression in the thirteenth section is that such lands so returned "*be assessed and charged to the payment of the rates or taxes imposed by this act.*" And, by the act, the rates to be imposed are after the first Monday in January, 1820, and for every subsequent year. I am of opinion that the lands in these cases were liable for the taxes for the whole year 1820, and not merely from the 1st of July of that year. This construction creates no difficulty, for the lands so liable to taxes did not appear upon the township rolls, but were returned directly to the treasurer of the district, and he was required to keep accounts against the different lots. The treasurer had only to charge the pound rate which the justices at the sessions after they had the returns from the assessors should have fixed upon the ratable property of the district for the current year. I think the plain obvious meaning of the act is that all lands which should be returned by the surveyor general before the 1st July should be liable to that year's taxes.

In these cases it seems that the taxes for the eight years were calculated up to the 1st of July, 1828, when they should have been calculated to the 1st of January, 1828. The sum is correct enough, and it only remains to be considered whether the warrant should be considered as void for omitting a part of the year 1820 and including a part of the year 1828. I am of opinion that the warrant is not to be considered void on this ground. That part of the warrant stating the taxes for the eight years to be up to 1st of July, 1828, which would include any part of 1828, may be rejected as surplusage; and it was not in the power of the treasurer or the justices, according to my view of the act, to remit any portion of the year 1820, and the taxes for that whole year must be considered as forming a portion of the sum due, and consequently the eight years expired on the 1st of January, 1828. The limitation of the commencement to be the 1st of July, 1820, I look upon as not vitiating the warrant, because if the whole year's taxes were due, there being no previous taxation of the lands, there could be nothing more necessary in the warrant than to shew that eight years were in arrear,

previous to the year in which the warrant issued, and it did so in these cases.

I think the verdict for the defendants must be allowed to stand.

Per Cur.—Rule discharged; postea to the defendants in each case.

KEELEY ET UX. V. RAILE.

FINLAY V. RAILE.

Protection to Justices against costs—4 & 5 *Vic. ch.* 26, *sec.* 40, *not repealed by* 14 & 15 *Vic ch.* 54.

Held: First, That the facts of this case, stated below, were such as to entitle the defendant to the protection afforded by 4 & 5 Vic. ch. 26.

Secondly, That the privileges extended by that statute to justices, as regards exemption from costs, are not cancelled by the late act 14 & 15 Vic. ch 54.

(Q. B., E. T., 15 Vc.)

These were actions of trespass and false imprisonment. Plea, not guilty, "by statute." Tried before Macaulay, C. J., at Kingston.

In *Keeley et ux.* v. *Raile*, a verdict was given for the plaintiff, and 2*l.* 10*s.* damages.

In *Finlay's* case, there was a verdict for the plaintiff, and one shilling damages.

In *Keeley's* case, after the trial, the plaintiffs moved for a certificate of the judge, under the statute 4 & 5 Vic. ch. 25, sec. 67, and ch. 26, sec. 40, that he approved of the verdict. This was reserved for consideration.

In *Finlay's* case the like certificate was moved, and the learned judge refused it.

Ultimately no certificate was granted in either case, and the plaintiffs entered their judgments, taxing, nevertheless, full costs.

The defendant, as a justice of the peace, on the 2nd of July, 1851, issued his warrant to a constable, reciting an information and complaint on oath of Daniel Keeley, that Margaret Keeley, wife of Martin Keeley, and Martin Keeley her son, did, on the 1st of July 1851, "commit a trespass on Daniel Keeley, by forcing into his premises, which he peaceably occupies, contrary to the form of the statute;" and commanding him to apprehend them, and bring them before him, to answer to the said charge. And on the 3rd of July the defendant convicted them, "for that they did forcibly enter upon, and commit damage and injury to and upon the premises of Daniel Keeley, situated, &c., contrary to the form of the statute," (not specifying the nature of the injury or

damage.) And he adjudged Margaret Keeley, for the said offence, to forfeit 2*s.* 6*d.* as a reasonable compensation for the damages and injury, and to pay 14*s.* 4*d.*, being half the costs; and that she should pay those sums on or before the 13th of July, or be imprisoned for one calendar month unless sooner paid: and, and in the same conviction, he adjudged Martin Keeley to pay 2*s.* 6*d.*, as a reasonable compensation for said damage and injury by him committed, and 14*s.* 4*d.* for his half of the costs, with the same clause as to commitment in case of non-payment on or before the 13th of July; and he directed the fines of 2*s.* 6*d.* to be paid to Daniel Keeley, and also the 1*l.* 8*s.* 8*d.* for costs.

The costs taxed in the action of trespass were 45*l.* 1*s.* 3*d.*, the disbursements for witnesses being very heavy. The writ of summons in the action was issued on the 30th of August, 1851. Judgment was entered on the 28th of February, 1852. On the 12th of March, 1852, the defendant moved a judge in chambers to stay proceedings on the judgment, on the ground that no costs should have been taxed to the plaintiff without a judge's certificate, under 4 & 5 Vic. ch. 26, and that none was obtained.

The declaration was against the defendant, describing him as a justice of the peace. The defendant pleaded the general issue by statute. The plaintiff gave the usual notice, a month before action brought, to the defendant, as a justice of the peace.

In *Finlay's* case, the costs taxed were 19*l.* 4*s.* 4*d.* The circumstances of the two cases were the same, Finlay having accompanied Keeley and his wife in committing the act complained of, which was nothing more than an entry against Daniel Keeley's will, and contrary to the prohibition of his tenant, upon some land which she made claim to. It was not a case within the act for punishing malicious injury to property; and there was an irregularity in the justice's proceedings, for he had taken no information on oath, it seemed, till after he had made the warrant—that is, he did not first swear the complainant, or his witness, to the statement, though he did directly afterwards. The conviction and warrant stated no offence sufficient to justify an arrest.

There was no doubt, however, but that the defendant acted in good faith, though ignorant of his duty. He was reluctant to act in the matter, as it was a family dispute.

Phillpotts for the defendants, moved to set aside the judgments for irregularity, with or without costs, on the ground that no costs should have been allowed, or no more costs than damages; or for a revision of costs upon that ground.

Richards shewed cause.

The questions in each case were, whether, under the circumstances, the case was one in which the protection of the statute 4 & 5 Vic. ch. 26, sec. 40, would apply, supposing it were still in force: secondly, whether the late statute 14 & 15 Vic. ch. 54, applies to this species of protection—that is, against the costs of the action: thirdly, if it does, then whether the 4 & 5 Vic. ch. 26 should in these cases be held to be repealed by it, the notice of action long before the 14 & 15 Vic. ch. 54 was passed, and the process in the action taken out the same day that act was passed, viz., on the 30th of August. It was not shewn whether the suing out of the writ or the giving the royal assent to the act was prior in point of time.

ROBINSON, C. J., delivered the judgment of the court.

The justice has no doubt greatly erred in the discharge of his duty, but that alone would not deprive him of the protection of the act. It renders it only the more important for him. His intentions are not impeached. The case of *Beechey* v. *Sides*, 9 B. & C. 806, and many others that might be referred to, leave no doubt on that point, and the legislature have shewn their intention to be that the justice shall have the benefit of the protection, whenever he acts *bona fide* in the supposed execution of his duty. The 9th section of 14 & 5 Vic, ch. 54, is explicit to that effect.

Then, has the late statute, 14 & 15 Vic. ch. 54, deprived the justice of the protection afforded by our statute 4 & 5 Vic., ch. 26, section 40. The preamble of that act shews that the legislature meant to embody in one act all the special protections which were to be extended, but they have made no provision of the nature of that which is now in question—disabling a plaintiff who recovers against a justice from claiming costs of suit, unless the judge who tried the cause shall certify his approbation of the action and of the verdict. Does their act then cancel the privilege given in this respect by the 4 & 5 Vic., ch. 26, sec. 40? I am of opinion it does not, because the legislature tell us what they intend to repeal, and they have left this protection untouched. They do not repeal all acts which afford protection to justices, but only such acts or parts of acts as confer certain protective privileges which are specified in the first clause of this new statute, and nothing in that clause touches the provision now in question, which is not one relating to amount of costs, but to the right to costs.

We think the rule should be made absolute for setting aside the judgments, unless the plaintiffs remit the costs.

CANADA COMPANY v. PETTIS.

SAME v. SAME.

Case for overflowing land—License—Corporation.

Case for overflowing land of the Canada Company. The defendant produced a letter to one S., under whom he claimed, from the plaintiffs' agent, saying that the land would be sold to him for the purpose of erecting a sawmill, on certain specified conditions,—two of which were, that the mill should be in operation within twelve months, and that he should furnish the Company, or their settlers, with lumber at a reasonable rate.

Held—That this letter could not be construed as a license to the defendant to overflow the plaintiffs' land to any extent necessary for working his mill, without clearly shewing that the probable effect of building the mill and putting up the dam, was known to and contemplated by the parties at the time.

Held also, that the plaintiffs, as a corporation, could not be bound, with respect to such an injury as was shewn in this case, by anything done by their ordinary agents, without special authority.

(E. T., 15 Vic.)

These were actions on the case for overflowing lands of the plaintiffs, situate in the townships of McGillivray and Bosanquet (in different counties): one of the actions was tried at Goderich, the other at Sandwich.

In the first case the plaintiffs obtained a verdict for 500*l.* damages, upon the undertaking of the plaintiffs, through their counsel in open court, that nominal damages would be taken, if the defendants should abate the nuisance and pay costs.

In the latter case there was a verdict for the plaintiffs and one shilling damages.

In the case tried at Goderich, the declaration charged that the plaintiffs, long before, &c., were possessed of 10,000 acres of land in the township of McGillivray, through which the River Sable used to flow, and of right ought to flow; yet that the defendant, well knowing, &c., therefore, to wit, on the 1st of January, 1834, and on divers other days between that day and the commencement of this suit, wrongfully erected a dam across the river, below the plaintiffs lands, and continued the same to the commencement of this suit: whereby the water had been penned back upon the plaintiffs' land, and had overflowed 5,000 acres thereof, rendering it of no value to the plaintiffs.

The defendant pleaded, among other defences—

1. That he committed the alleged grievances by the request, leave and license of the plaintiffs

2. That one Smart, on the said 1st January, 1834, by the request, leave and license of the plaintiffs, built the dam, and that the defendant,

as his servant, and by his command, continued the dam until the commencement of this suit, by the like request and license of the plaintiffs.

3. That Smart, on the said 1st January, 1864, by leave and license of the plaintiffs, erected the dam, and that the defendant, as the occupier of the mill adjacent to the said mill-dam, under the said Smart and his assigns, by the like request, leave and license of the plaintiffs, kept and continued the dam, and committed the said grievances from the said several times as aforesaid, until the commencement of this suit, as he lawfully might, &c.

4. That the defendant, with Smart, Brewster, and other persons named, at the said times, when, &c., by leave and license from the plaintiffs, committed the said grievances, &c.

The plaintiffs replied, traversing the license as alleged in these pleas respectively.

The pleadings in the other action were precisely similar, the injury complained of in that action being to lands of the plaintiff's in the township of Bosanquet, in the county of Lambton.

On the trial of the first action, before Macaulay, C. J., it was admitted that the defendant claimed, under Brewster and Smart, having become a partner with them, but only since November last. The mills were built in 1832 or 1833, and it was shewn that they did occasion a very large tract of land belonging to the plaintiffs to be covered with water, though the defendant contended that the quantity was exaggerated. The dam was built, in part, at least, on land belonging to the Company. It appeared that, in 1832, Brewster and Smart, desiring to erect a saw-mill, and to acquire some land of the plaintiffs on which there was pine timber, corresponded with Dr. Dunlop, the Company's agent, or officer, on the subject; and the defendant relied upon a letter written by Dr. Dunlop on the 9th April, 1832, for supporting his plea, of license to Smart, coupled with evidence that the Company, through their agents, had bought lumber sawed at their mill in the intervening time, and that their officers were aware of the damage by back water, but did not complain till lately.

On the other hand, one of the commissioners of the Company swore that he was not for many years aware of the extent of the injury occasioned dy the dam;—that the right to overflow their land was not a subject of discussion or treaty with Brewster and Smart, but merely the purchase of land and the situation of the mill.

The learned Chief Justice considered that the 4th plea was the one best adapted to the defence, but that the letter of Dunlop relied on did

not support the plea of license; that it was in fact no license to overflow land, but referred to the sale of land at a certain price; that it appointed no place where a dam might be built, and did not seem to contemplate a dam being built on the plaintiff's land; and that it not being under the seal of the Company they would not be bound by it, even if it had amounted to the grant of an easement or a license. He held that nothing shewn could avail the defendant as proof of a license; that Dunlop's letter was written for a different purpose, and did not pretend to confer a license, and could not constitute a grant of an easement binding on the plaintiffs; and that no proof of mere acquiescence and forbearance would support the pleas nor the evidence which was given; that in 1834, soon after the dam was erected, the plaintiffs' commissioner or agent entered into a contract with the then proprietors of the mill, Messrs. Brewster and David Smart, to take on certain terms all the lumber, with some specified exceptions, which they should make at the mill until the 1st July, 1837.

The letter mainly relied upon for supporting the defence of license was a letter dated at Sandwich, 9th April, 1832, signed, "W. Dunlop," and addressed to Robert Smart, who was first concerned in building the mill. It was to this effect that Dr. Dunlop had communicated to the commissioners of the Company Smart's desire to erect a sawmill on the Riviere aux Sables, and was instructed to say that the pinery he required would be sold to him at the rate of 7*s.* 6*d.* (per acre) on these conditions,—viz., that he would build thereon a good and sufficient saw,mill, and that the Company would reserve the right of placing a lock (at their own expense) in his dam;—that the saw-mill should be in operation within twelve months, and that he should furnish the Company or their settlers with lumber at a reasonable rate. These conditions being complied with, he said, the Company would give him a deed of possession, in free and common soccage, so soon as the land should be surveyed and paid for;—that if he, Smart, would make the lock in the dam, the price should be deducted from his payment for his land.

The plea of license to overflow the Company's land to an unlimited extent was attempted to be supported by this letter of Dr. Dunlop, of whose precise position in the Company, or to what extent and in what description of transactions he was authorized to bind them, and by what formality, no evidence was given.

The plaintiffs obtained a verdict for 500*l.* damages, upon an undertaking, through their counsel in open court, that nominal damages

would be taken if the defendant should abate the nuisance and pay costs.

In the latter case (tried at Sandwich) there was a verdict for the plaintiffs and 1*s.* damages. The evidence in effect was the same in both cases.

Vankoughnet, Q.C., with whom was *Cooper*, obtained a rule nisi in the first case for a new trial, with or without costs, on the ground that the verdict was against law and evidence and because the damages were excessive, or for misdirection and on affidavits. They cited *Liggins* v. *Inge*, 7 Bing. 682; *Winter* v. *Brockwell*, 8 East, 308; *Bridges* v. *Blanchard*, 1 A & E. 536; *Wood* v. *Mauley*, 11 A. & D., 34.

Cameron, Q.C., shewed cause, and cited *Robinson* v. *Desserly*, 8 U. C. R., 340; *Beaver* v. *Reed*, 9 U. C. R. 152.

ROBINSON, C. J., delivered the judgment of the court.

If this had been a case of an individual proprietor acting in his own behalf and capable of binding his rights real or personal—using no greater solemnities than the Statute of Frauds requires, unless in those cases in which an assurance by deed is necessary upon principles of the common law—the first question would have been, whether his agreement to sell the land to Smart, in order that he might take from it timber to be sawed in the mill which he was going to erect, or anything contained in such a letter as was written by Dr. Dunlop could be held to constitute a license to overflow the land of such individual to any extent, unforeseen, perhaps, by either party, that might be found necessary or convenient for working the proposed mill;—or whether it would not be more reasonable to hold, that the only object of writing the letter was to acquaint Smart with the conditions on which the land would be sold to him, assuming that he had ascertained, or would ascertain, that he had it in his power to erect and use a saw-mill upon the land which he already held, or on that which he proposed to acquire, without doing damage to the property of others; and that there was nothing in the letter which would relieve him from the necessity of acting at his own peril in that respect.

The next question would be whether either that letter, or the subsequent conduct of the individual, amounting to an apparent acquiescence, would be binding upon him—or whether the other party would not require a grant by deed to protect him in the assumed use of an easement upon his neighbour's property.

On the first of these points I am of opinion that, without clear evidence that the probable effect of the building the mill and putting up a dam was known to and contemplated by the parties at the time, it would be contrary to reason to infer a license, to commit such an injury from anything contained in the letter relied upon, and indeed that the letter imputes no license to interfere in any degree with the enjoyment of the property of the person writing it; and I do not see in the other evidence in the cause anything that could be properly taken to imply a permission to commit the injury complained of.

It is sworn by Mr. Jones that for years after the sale of the premises took place he was wholly unaware of the great quantity of the Company's land which the dam had rendered useless. Nothing, indeed, can shew more strongly how little foundation there is for concluding that any such permission was understood and intended to be given, than the inconsistent pretences advanced since this litigation has arisen. At one time the defendant, or those concerned with him in interest, endeavour to make out that the injury is comparatively trifling, and is such as ought to be and might be quietly acquiesced in by the Company, and that in talking of thousands of acres being overflowed they are exaggerating the injury most unreasonably; but when the object was to make an advantageous bargain with the Company, and to obtain large compensation for consenting to pull down the dam, Mr. Brewster represented, in a letter produced on the trial, that the Company could well afford to make him the compensation he required, for that they would thereby be rescuing from destruction some 5,000 or 10,000 acres of land rendered useless by the dam.

If it had been the case of an individual proprietor, and if the evidence had clearly established a license to the full extent of the injury proved which we think it does not by any means, then upon the next point,—whether a parol license of this kind would protect the defendant, or whether he must not fail in this action against him for the injury, because he cannot shew a grant of an easement under seal.—I am not sure that I might not find myself opposed in opinion to one or both of my brothers. It is still my understanding of the law on this point, as I have intimated in the case of *Robinson* v. *Fetterly*, 8 U. C. R. 340, and have explained more at large in the case of *Beaver* v. *Reed*, very lately disposed of by us (*ante* page, 555,) that although a parol license to overflow another's land, or to exercise any easement in the soil of another, would not give a right on which the licensee could stand if he

were himself advancing it as a plaintiff, and were suing the other for obstructing him in the enjoyment of an easement which he claimed to have thus acquired; yet that it would avail the license as a protection against an action of the licensor suing him in tort for doing the very act which the licensor had, by parol, authorised him to do. The distinction is plainly taken in *Carrington* v. *Roots*, 2 M. & W. 255, and in *Liggins* v. *Inge*, 7 Bing. 682, and there is nothing in my view of the case of *Wood* v. *Leadbitter*, 13 M. & W. 840, or any more modern cases, that can be said to be opposed to it. I endeavoured to make this appear in the case of *Beaver* v. *Read*, and need not go over that ground again, especially as I think there is in the evidence in this case no sufficient proof of a license by parol; and if there were, and if we should all concur in thinking such a license might serve to protect a defendant against a claim for damages as a wrong-doer, yet there is this further difficulty in this case, that it is not one individual whose rights are in question here, but a corporate body, and nothing can be found in the law of England or of this province, nor even, I may venture to say, in adjudged cases in other countries acting in accordance with the English common law, but taking in general a great deal more latitude in their method of dealing with the rights and interests of corporations, which could support us in holding that these plaintiffs could have their interest in some thousands of acres of land compromised and rendered worthless to them by anything done by their ordinary agents without any special authority to bind them in this particular matter; or rather, which is contended for here, by the mere tacit acquiescence of such agents. We could not hold this to be a matter of that constant and ordinary occurrence in the usual transaction of the Company's affairs through their agents, that an authority so to bind them could be implied upon any principle that has been applied to corporations; and upon these grounds, we are of opinion that the verdicts have been properly rendered for the plaintiffs. As to the damages being excessive, nominal damages were probably given in the case last tried on account of the substantial damages which had been given in the other, for in truth the injury proved to the lands in the county of Lambton seemed to call for much greater damages than the injury to those in the township of McGillivray. But we cannot pretend to say that the damages were certainly excessive, taking Dr. Brewster's account of the effect produced by the dam. It is true this defendant's liability began at a recent period, but the damage to the plaintiffs in preventing sales and

settlement might accrue to a large amount in a short time, for all that we can know; and the amount of damages is rendered unimportant by the understanding come to at the trial (and which the court would of course see carried out), that on the nuisance being removed the damages will be remitted.

Rule discharged.

HOULSTON v. PARSONS.

Note made on Sunday in payment for goods sold, not void in the hands of an innocent indorsee, 8 Vic., ch. 45.

Under 8 Vic., ch. 45, sec. 2, a note made on Sunday in payment of goods sold on that day is void as between the original parties, but not as against an indorsee for value, and without notice.

Appeal from the County Court of the United Counties of Lincoln and Welland.

Action on a promissory note made by the defendant on the 9th of March, 1851, "at St. Catharines, to wit, at Niagara, in the County of Lincoln," whereby the defendant promised to pay to one Edward Lyons, or order, 55*l* 5*s*. for value received, four months after date;—stating indorsement of the note by Lyons to one Lee, and by Lee to the plaintiff.

The defendant pleaded that the note was drawn and delivered by the defendant to Lyons on a Sunday—to wit, on the 9th of March 1851—and was made and given in payment of goods sold and delivered by Lyons to the defendant on that day, being a Sunday—contrary to the form of the statute, on which account it was void.

This plea was demurred to, and judgment was given in the County Court in favour of the plaintiff on the demurrer, which judgment was appealed from.

W. Eccles, for the appeal, cited *Begbie* v. *Levi*, 1 Cr. & J. 180.

Boomer, contra.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the judgment was properly given for the plaintiff, and that the appeal must be dismissed with costs.

Independently of any objections to defects in the plea, we think the statute 8 Vic. ch. 45, in the second clause, only makes void all sales and contracts for sale of any real or personal property made on a Sunday; but not making void the security given in payment for any goods so sold, this not made void in the hands of a *bona fide* indorsee

for value, and without notice—not being a contract within the terms of that clause, and liable only to the exception that it was made in furtherance of such a contract. This would make it void as between the original parties, but not against this plaintiff.

Appeal dismissed.

THE QUEEN EX REL. MCNAMARA V. CHRISTIE AND PAINTER.

Election of School Trustees—13 & 14 *Vic., ch.* 48—"*Taxable Inhabitants*," *meaning of.*

Persons who are rated only for statute labour, and are not householders are not "taxable inhabitants" within the meaning of 13 & 14 Vic., ch. 48, sec. 22, and cannot, therefore, vote at the election of school trustees.

Quære whether the fifth and seventh clauses of that act apply to the electors of school trustees for towns, or only to those for townships—*Semble*, that the seventh, at least, applies to both.

Duggan obtained a rule *nisi* on the defendants, to shew cause why an information or informations in the nature of a *quo warranto* should not be exhibited against them, to shew by what right they respectively claim to be school trustees of the town of Niagara, and members of the Board of School Trustees of that town, on the grounds

1—That the election held on the 14th of January, 1852, in and for the St. David's ward of the town of Niagara, of the school trustees, was not conducted according to law, because there were two other candidates—viz. Munroe and Bowen—both duly qualified, and for whom a majority of the taxable inhabitants of St. David's ward would have voted, but the returning officer, John Ross, Esquire, refused to take votes for them, or either of them, requiring that the "taxable inhabitants" should not only be taxable inhabitants of the said ward, but should be taxable inhabitants beyond the amount of ten shillings, before they could be allowed to vote.

2—Because he refused to receive the votes of taxable inhabitants though tendered in favour of Monroe and Bowen.

The election was holden on the 14th of January, 1850.

Christie and Painter had, one eighteen, the other nineteen votes; Munroe fourteen, Bowen fifteen. Christie and Painter were declared duly elected, and had attended and voted at the board; and it was sworn that as many as seven taxable inhabitants offered to vote for Munroe and Bowen, but were refused because they were only statute labour voters.

Against the rule it was shewn that McNamara, the applicant, was a resident of St. David's ward, and entered on the collector's roll for that ward as liable to pay ten shillings in lieu of statute labour, but was not on the roll of that or any other ward of the town for any tax upon upon income, or on real or personal property, or liable to pay within the town any tax except the statute labour commutation; and so also of Aillis, the other person on whose affidavit the information was moved for: and it was sworn that if all those similiarly situated had been allowed to vote, it was believed there would still have been a majority for the two who were returned.

The returning officer swore that he rejected no vote of any person assessed on the roll for property or income, and confirmed the statement that he rejected McNamara and Aillis, who claimed solely on the ground that they paid ten shillings in lieu of statute labour, not considering them to be "Taxable inhabitants" within the meaning of the act.

Vankoughnet, Q. C., shewed cause, and cited the *Queen ex rel. Lawrence* v. *Woodruff*, 8 U. C. R. 336; In the matter of The Aston Union, 6 A. & E. 784; Cole on *quo warranto*, 162.

Duggan, contra, cited *Rex* v. *Ramsdel et al.*, 3 A. & E. 456; *Rex* v. *Jefferson*, 2 N. & M. 437; Cole on *quo warranto* 162.

ROBINSON, C. J., delivered the judgment of the court.

The School Act, 13 & 14 Vic., ch. 48, under which the question arises who have the right to vote for school trustees in incorporated towns, enacts, in the twenty-second section, that in each ward "two fit and proper persons shall be elected school trustees by a majority of all *the taxable inhabitants* of such ward."

It has been made a question whether the fifth and seventh clauses of the act apply to the electors of school trustees for towns, or only to those for townships. They form part of one of the general divisions of the act, which is headed "election and duties of school trustees," not of school trustees for townships only; and if nothing that is in that division of the act applies to trustees for cities, towns, or villages, but only to those for townships, then this act is manifestly imperfect, for there are various enactments which are in their nature as applicable to and as requisite for the office of school trustees for cities, towns, and villages, as for those of townships, and for which there is no provision made in regard to cities, towns, and villages, if these latter are to be held not to be included for any purpose within the first general division of the act. If, on the other hand, the school trustees for towns should

be held to be included within the fifth and seventh clauses, (though there are doubtless several others of the clauses of that same division which are not applicable to them), then it is plain enough that the voters for school trustees in towns, &c., as well as townships, must be freeholders or householders.

My inclination at present is rather in favour of holding that the fifth and seventh clauses, or at least the seventh, may be so construed as to include both classes of elections. I believe that to have been the intention of the statute, though there are some difficulties in the way of that construction. But on the broader ground that "taxable inhabitants" does not include persons who are not householders, and who are only rated for statute labour, we all think the returning officer was right in rejecting such voters.

In 2 Inst. 702, the word "inhabitants" as used in the statute 22 Hy. VIII. ch. 5, which provides that bridges shall be repaired by the *inhabitants* of the shire or riding, &c, is held to extend to none but *householders*—not to servants or others who, though residing therein, are not householders.

In Gateward's case, Co. 60, the court say, "in these words inhabitants and residents, are included tenant in fee simple, tenant for life, for years, tenant by elegit, tenant at will, &c., and he who hath no interest *but only his habitation and dwelling*," which clearly means that he must at least, upon some footing, have a habitation or dwelling held by himself, and not be merely an inmate in another person's dwelling, which any of these persons assessed only for statute labour might be.

The language of Lord Tenterden, in *Rex* v. *Hall*, 1 B. & C. 136, supports the construction which we put on the word "inhabitants" as used in this act, though the word may be used on occasions and for purposes when it might be proper to give it a larger construction. In *Rex* v. *Mashiter*, 1 N. & P. 314, it is intimated that the term "inhabitant" is to be construed according to the subject matter in which it is found, any that it has not any precise legal meaning. On this principle, we can have no difficulty in believing that the legislature never meant to leave the selection of those who were to appoint teachers of youth to persons who are not even householders, and possess no property real or personal, especially when the trustees among their powers have the power of assessing others.

We are of opinion that the rule must be discharged with costs.

Rule discharged.

DIGEST OF THE CASES REPORTED IN THIS VOLUME.

ACCOUNT STATED.

A district council cannot be sued upon the common money count upon the account stated, unless at least the subject matter of account be averred, and is seen to be such as can by law create a debt from the defendants to the plaintiffs, to be satisfied out of the funds of the district. *Huron Dist. Council* v. *London Dist. Council*, 89.

ACTION.

See ASSUMPSIT.

Municipal Councils — Right to sue each other — Form of action Pleading—Demurrer.]—1. One district council may sue another district council for a cause of action connected with their public duties; and the balance of district revenue which the district withholds from another affords legal ground for such an action. *Semble:* That it was not necessary, before action, to give a notice to the treasurer of the London District of the claim of the plaintiff against the District. *Semble also:* That it was necessary, in order to a right to action, to aver a request from the plaintiff to the defendant to pay over the money due. *Semble also:* That in suing for a debt as due by the district, under the 43rd clause of the 4th and 5th Victoria, chap. 10, it should be averred that the defendants have funds to pay the debt, after discharging the demands to which the 59th clause gives a preference. *Huron District Council* v. *London Dist. Council*, 89.

Action for calls — Evidence — Stockholders admissible as witnesses —Non user—Forfeiture of shares.] 2. Action for calls under the statute 1 Wm. IV., chap. 12, against the defendant as one of the stockholders. *Held per Cur.*—that stockholders in the said corporation are admissible as witnesses for the plaintiffs, under the statute 12 Vic. ch. 70; that proof of a conveyance of Hetherington's interest in the Marmora Iron Works was not required under any of the issues; that the said act is not obsolete for non use; that the clauses of the said act requiring the books of subscription to be opened within two months, is only directory; that the subscription books subsequently opened may be considered as in connexion with the subscription books previously opened, and that all the proceedings from the beginning may be taken together in connection with or relative to the object; that the omission of Hetherington's name in the new subscription books (he being dead) does not render the proceedings of the company invalid, nor is it fatal to the plaintiffs in this action: that the sanction for the opening of the new subscription books of the two surviving petitioners to parliament for the act of incorporation is sufficient; that the names of the petitioners in the said act named need not necessarily be signed to the new subscription books; that the defendant was not discharged from his liability by a minute made at a meeting of the directory, and entered in their minute book, declaring that the names of all stockholders who

were in arrear should be erased from the subscription stock book of the company. *Marmora Foundry Co.* v. *Murney*, 279.

Action against a shareholder for calls.]—3. By the Marmora Foundry Act, 1 W. IV., ch. 11, it is provided that the stock subscribed for "shall be due and payable to the said company" in the manner mentioned in the act: and that in case of neglect or refusal to pay the instalments due on shares, such shares shall be forfeited and sold. *Held* (in accordance with the Court of Common Pleas), that the company were not restricted to the remedy by forfeiture;—and also, that they might maintain an action against a shareholder upon calls of stock subscribed. (Draper, J., *dissentiente.*) *The Marmora Foundry Company* v. *Jackson. The Same* v. *McElroy*, 646.

4. An action of debt is maintainable against a municipal council upon a contract entered into with the building committee for building the gaol and court house of the District, before the District was set apart, and it is sufficient in the declaration to describe the building committee as such, without naming the persons of whom it was composed. *Keating* v. *Simcoe District Council*, 3.

12 *Vic., ch.* 81, *secs.* 175 *and* 176 *—Right of townships councils or county councils to sue for a local debt due to old district councils.*]—5. Under the 175th and 176th clauses of the 12 Vic., ch. 71, the township councils and not the county councils are entitled to receive monies due to the old district councils, where the debt is due to the locality, as for making roads in a township, &c., and *Held, per Cur.*, that in this action the money sued for, belonging to the township council, and not to the county council, the plaintiffs, (the county council) must be nonsuited. *Municipal Council of Northumberland and Durham* v. *Bull Meyers*, 3.

6. Where the plaintiff brought an action of debt on the common counts against the Huron District Council, for compensation awarded to him by a jury, for making a road across his premises, before the formation of the Huron District, and while the land formed part of the District of London, and the Huron District had, after its erection, assumed the payment of the sum awarded, the court held that the action would not lie against the Huron District Council at all, but that even if the Council had been responsible, the declaration should have been special. *McKee* v. *Huron District Council*, 15.

10 & 11 *Vic., ch.* 93—*Departure from terms of contract—Action on common counts—Time for payment—Objections not duly taken at trial cannot be urged in term.*]—7. The Grafton Road Company have power, under 10 & 11 Vic., ch. 93, sec. 35, to make contracts by parol. Where the terms of a sealed contract have been so far departed from as to put it out of the power of the contractor to sue upon it, he will not be precluded, after his employers have accepted the work, from bringing his action for the value of the work done. Although where a plaintiff by his own act has put it out of his power to sue on a contract he cannot insist on prompt payment in an action on the common counts, yet, where the objection that the time for exacting the last payment under the contract had not arrived when the writ in the cause was sued out was not made when the plaintiff closed his case, but merely by way of objection to an observation made by the learned judge when charging the jury, the court will not admit the objection to be urged in term on a motion for a new trial. *Semble:* That a recovery in an action on the

common counts for work and labor, or for any part of the value of the work, would be taken to preclude any other action for the same work. *Turley* v. *Grafton Road Co.*, 450.

ARBITRATION.

Commissioners of Public Works —Cornwall Canal—Arbitration—Setting aside award.]—1. In dealing with awards made under the Provincial Acts 9 Vic. ch. 87, sec. 24, and 10 & 11 Vic. ch. 24, sec. 8, the court will be governed by the ordinary rules of law as applicable to awards made between party and party. Under the two acts above mentioned, a submission by the Governor in council to arbitration, is a submission in effect by the commissioners of public works. The award made by the arbitrators appointed under the above acts, stated that they awarded that the commissioners of public works should pay to A. the sum of, &c., for the damages done to his property in the village Milles Roches, by the construction of the Cornwall Canal." No further particulars of damage were stated in the award. Affidavits, however, were filled by the engineers of the public works, to shew that in their belief the sum awarded must have been given, from its amount, for consequential and not direct damage, such as the commissioners contended the arbitrators could alone award upon. But, *Held, per Cur.*, that the affidavits nowhere stating in positive terms that the commissioners had allowed for consequential damages, and the award being silent upon the subject as it might be—the court could not assume the fact to be so—and upon that ground (if a valid one) set aside the award. *Quære?* have the arbitrators the power under the acts above named, to award for consequential damage, as for loss of the carrying trade through the village of Milles Roches. No decision of the court was rendered necessary upon this point, but see the opinions of the court thereupon. The time given by the statute within which to move to set aside these awards, viz., one year, extends to Upper as well as to Lower Canada. *Commissioners of Public Works* v. *Daly et al.*, 158.

Mutual insurance—Debt on bond —Award of arbitrators.]—2. The plaintiff insured his property with the defendants; upon its destruction by fire a dispute arose as to the loss, and the matter was referred to arbitration. After the fire, but before the award, the plaintiff assigned the bond of submission, the policy of insurance, and the money due thereon, to one H. G. H. *Held*, that the assent of the defendants to the assignment was not necessary. *Held also*, that the assignment of the submission bond did not, under these circumstances, by vesting the interest in the assignee, affect the legality of the award made under it. *Held also*, that the act abolishing districts (12 Vic., ch. 78) does not take away from the defendants the name given to them by their charter. *Semble*, That the making of the award is not admitted by the pleading in this case. But *held*, that it was sufficiently proved by shewing that the defendants had acted upon it by paying a portion of the sum awarded, and that their officer had stated in writing the particulars of the award, and the sum remaining due on it. *Hughes* v. *The Mutual Fire Insurance Company of the District of Newcastle*, 628.

ARREST.

1. When a private person—not being by office a keeper of the peace or a justice, or constable — takes upon himself to arrest another, with-

out a warrant, for a supposed offence, he must be prepared to prove, and to affirm it clearly and unequivocally in his plea, that felony has been committed; strong suspicions of a felony having been committed will not do. *McKenzie* v. *Gibson.*

Common gaol—Detention of prisoner—Authority—Jurisdiction.]—2. The gaolor of a common gaol is bound to receive into and detain in the gaol until released by lawful authority, a prisoner delivered into his custody by a constable on a charge of felony, without warrant; and may justify in an action for false imprisonment without shewing what the particular felony was with which the plaintiff was charged. *McKellar* v. *Macfarland and Kidd*, 321.

ASSUMPSIT.

Assumpsit—Municipal Council—Justices—Treasurer.]—1. The 48rd clause of the District Council Act, 4 & 5 Vic. ch. 10, does not subject a District Council to be sued upon an implied assumpsit, by reason of any transaction that may have occurred between the plaintiff and the justices in quarter sessions, or the treasurer of the district, before the existence of the council. *Semble:* The District Council is not identical with the former Court of Quarter Sessions. District Councils are only liable on those express contracts made by the Justices or Treasurer, under enactments of particular statutes. *Low et al.* v. *Ottawa Dist. Council*, 185.

Corporation—Assumpsit—When corporation must contract under seal.]—2. *Held per Cur.*, That an action of assumpsit would well lie against the Gas Light and Water Company of the City of Toronto, for damages, in not fulfilling a parol agreement with the defendant, for the supply of water to the Toronto Baths. *Blue* v. *Gas and Water Company*, 182.

Statute 11 *Vic., ch.* 14—*Consumers' Gas Company of Toronto—Assumpsit—Averments in declaration.*]—3. Under the statute 11 Vic., ch. 14, the Consumers' Gas Company of Toronto may sue in assumpsit for calls; the remedy is not confined to debt. In so declaring under the act, an averment of consideration to support the promises is not necessary; neither is it necessary to lay the promise to pay on any certain day. The general terms, that the defendant afterwards promised to pay, is sufficient. *Consumers' Gas Company* v. *Nicolls*, 289.

BOND.

Building Society—Bond—Surety—Secretary and Treasurer.]—1. Debt on a bond given by C. & K. conditioned for the due performance by one D. of the office of secretary and treasurer to the Brantford Building Society. *7th plea*—That the office is an annual one: that the said D. was appointed for one year: that the defendants became sureties for the term of one year, and no longer: and that during such term D. faithfully performed the duties. *Replication*—That the defendants did not become sureties for the period in the plea mentioned, or for any other specified time. *Held, on demurrer:* Replication good. Under the Building Society Act, 9 Vic., ch. 90, it is not essential to the validity of a bond given for the performance of the treasurer's duties, that such treasurer should be joined in it with his sureties. *9th plea*—That D. did not, before his appointment, become bound in a bond, with two sufficient sureties, for the due performance of his office, in pursuance of the statute, &c. *10th plea*—That the said bond is not a security taken in pursuance of the statute, by a bond entered into by the said D. with two sufficient sureties. *Held, on demurrer:*

Both pleas bad for uncertainty.—11*th plea*—That the rules of the society did not provide that the treasurer, or other principal officer, should, once at least in every year, prepare a general statement of the funds and effects, according to the statute. *Replication*—That the rules of the society did provide that the statement referred to in the plea should be made at least once in every year, according to the form of the statute, &c. *Held, on demurrer:* Replication good. *Wilkes* v. *Clement*, 614.

Bond—Variance in setting it out—The effect of not setting out the condition of a bond, but treating it merely as a common money bond on a plea of non est factum—The effect of taking a verdict for the penalty, and not suggesting breaches on the record, where the bond comes within the statute.]—2. The plaintiffs, by the name of the "Council of the District of Brock," declared in debt on bond. The declaration stated that the defendants acknowledged themselves to be held and firmly bound to the said plaintiffs; the bond when produced at the trial was found to be given "to the Municipal Council of the Brock District.' The bond was not set out on oyer. *Held per Cur.*, that this variance was not fatal. The plaintiffs—who had taken from the defendant a bond for the due performance of a collector of rates' duty, with a condition in the form prescribed by certain municipal by-laws—declared upon this bond as upon a common money bond, without setting out the condition. The defendants pleaded *non est factum*. *Held, per Cur.*, that upon this plea, the condition being only a defeazance and not part of the bond, the bond, as set out without the condition, was a valid bond; that there was no fatal variance, and that the plaintiffs were entitled to recover. It would have been better, however, for the plaintiffs to have set out the condition in their declaration, and to have assigned breaches. In debt on bond—to take a verdict for the penalty, where breaches have not been suggested or assigned in the replication, and the bond comes clearly under the Stat. 8 & 9 Wm. III. is irregular, and the verdict may be set aside. *Semble*—that the breaches may be suggested even after verdict, and then the plaintiff may go down again before a jury and assess his damages. *Brock Dist. Council* v. *Bowen et al.*, 229.

Treasurer—Surety—Bond to the Crown—Liability.]—3. On an action on a bond made by A. to the Queen, as surety for B. who was appointed treasurer of the Western district, under the statute 4 & 5 Vic., ch. 10, sec. 29, and continued in office under that statute until he was re-appointed treasurer by the municipal council under the statute 9 Vic., ch. 40, secs. 7 and 8, which altered the mode of electing such treasurer. *Held*, that A. was not liable for any defalcations made by B. after his re-election by the municipal council under the statute 9 Vic., ch. 40, secs. 7 and 8, and that the bond given by A. ceased to be a security for anything done after that period. *The Queen* v. *Hall*, 315.

4. The Municipal Council Act, 4 & 5 Vic., cap. 10, does not vest in the municipal councils of the several Districts the right of suing upon bonds given by collectors of assessments to the treasurers of districts, after that act was passed; but, on such bonds, the treasurer of a district can sue in his own name. *O'Connor* v. *Clements et al.*, 13.

Liability of Deputy's surety to Treasurer of Western District—its extent, as depending on the change in the Treasurer's mode of appointment to office.]—5. A. became surety to B., the treasurer of the united

counties of Essex, &c., for the due accounting, &c., by C., as deputy treasurer, while he, B., continued in his said office. C. received monies for which he did not account, and B. sued A. upon the Bond. B. held his commission as treasurer from the government from the execution of the bond to the 10th October, 1846; and from that time to the 16th August, 1842, in consequence of a change made in the mode of appointment, he held his office under an election of the Municipal Council of the Western District: *Held, per Cur.*, upon these facts, that B. could sustain his action against the surety A.—1st, without proof in the first instance that he had actually paid the money himself which his deputy, C., had misspent; and secondly, that the surety was liable during the whole time the deputy was serving in the treasurer's office, without reference to the mode of the Treasurer's appointment. *Baby* v. *Baby*, 353.

1. The Municipal Council Act, 4 & 5 Vic., cap. 10, invests in the Municipal Council of each District the power of suing on a bond given to the Treasurer of the District, for the due payment over to him of the rates received by the collector, and it is sufficient to aver in the declaration that the monies collected are due and payable to the treasurer. *Eastern District Council* v. *Hutchins*, 11.

2. *Books of agent of public company—How far amissable in evidence to charge surety on his bond for defalcation of agent, agent being alive.*]—*Held per Cur.* (ROBINSON, C. J., *dissentiente*) that the books of the agent or clerk of a public company, *during his life time*, are not good evidence *against his surety* sued on his bond for a deficiency in the agent's accounts. *Ferrie* v. *Jones executor*), 382.

Motion to set aside interlocutory judgment and cognovit—Principal and surety.]—The defendant was one of two sureties in a bond, on which the obligee sued. An arrangement was made between his principal, his co-surety and the plaintiffs to which he did not consent as to himself, but to which he offered no objection as regards his principal and surety. Subsequently an action being brought on the bond against him, he allowed judgment to go by default, and gave a cognovit, reserving any means he might have in equity to relieve himself. He now applied to set aside the judgment and cognovit, which, under the circumstances, the *court held* could not be done. *Quære:* Whether the release given by the warden to the principal and one of the sureties, as mentioned in the statement and judgment of the court was binding at law? *Municipal Council of Essex, Kent and Lambton* v. *Baby*, 501.

BUILDING SOCIETY.

Building Society mortgage—Ejectment—Money paid voluntary—Pleading.]—Under 12 Vic., ch. 90, sec. 12, the president and treasurer suing on behalf of a building society, must be the president and treasurer for such society at the time of commencing the action. After trial of an ejectment brought upon a mortgage, at which leave was reserved to move for a non-suit, the suit was settled and the costs paid by a third party, interested as an after mortgagee of the same property. The costs were paid without the defendant's authority. *Held*, that this payment could not affect the defendant's right to recover costs from the plaintiffs in case a non-suit should be ordered; and consequently, the defendant having moved for a non-suit, that it was still necessary to determine the point reserved at

the trial. The fact of a payment having been made under protest, but without duress or assent on the part of the payee to any reservation of his right, would form no ground for an action to recover back the money. *Doe dem. Morgan et al.* v. *Boyer*. 598.

BUYING TITLES.

32 *Hen. VIII., ch. 9—Qui tam action for buying disputed titles.*]—A testator died, leaving a will, by which he directed that his debts should be paid as soon as practicable after his decease, and gave and bequeathed to his executrix and executors all his real and personal property in trust, to sell, &c., such parcels or tracts of land as might be necessary for carrying his intention into effect. He then gave the residue of his real and personal property to his wife during her life, and after her death to such of his children as might then be living, share and share alike. About twenty years after his death, his widow (who had married again) and one C. W., for three of the children then living, conveyed one of the lots now in question to one G. R., in fee; and G. R. subsequently conveyed to one P. L., who was in possession when the now defendant took his deed. About the same time the widow and one of the sons conveyed the other lot now in question to the now plaintiff, who was in possession when the new defendant took his deed for this lot. About sixteen years after these deeds were made, the defendant took a deed of bargain and sale of both lots from all the surviving children. *Held*, that there was nothing to prevent the children from conveying their reversionary interest; and that defendant was not liable, in a *qui tam* action, for purchasing a disputed title, under 32 Hen. VIII., ch. 9. *Ross qui tam* v. *Meyers*, 584.

BY-LAWS.

Quashing—Repealed by-law.]—1. The court discharged, with costs, a rule for quashing a by-law of a district council, where it appeared that such by-law had been absolutely repealed before the 12th Vic., ch. 81. *In re McGill and the Municipal Council of the County of Peterboro'*, 675.

2. Where a Corporation is empowered by statute to enact by-laws, and to impose a penalty for their infraction, not exceeding a certain amount, a by-law is bad, which annexes a penalty to an offence but does not declare its amount. The Corporation of the Town of London has power to make a by-law prohibiting the sale of butcher's meat within certain hours, except at the public market. *Peters* v. *London Board of Police*, 32.

3. Where a Municipal Council on being served with a rule *nisi* repealed the by-laws complained of, they will not be obliged to pay the costs of the application. *In re Coyne* v. *Municipal Council of Dunwich*, 595.

Quashing by-laws—Irregularity—Jurisdiction of Superior Courts.]—4. The court refused a rule *nisi* to quash by-laws of a township council, on the ground that, having passed a by-law to contract a loan, they had exceeded their powers in afterwards modifying the said laws; it appearing that such alterations could not affect the security of creditors. Or, on the ground that the said laws were passed at a special meeting called by a member of the council, and not by the town reeve or other authorised officer. And *semble*, with respect to the last objection—that it is doubtful whether the court has authority under 12 Vic., ch. 81, sec. 155, to quash a by-law for an irregularity in the manner of its being passed, though they might hold it

void if relied upon in support of something done under it; and that if they should entertain a motion to quash any by-law on account of an irregularity in passing it, it would rather be under the principles of the common law. *In re Hill and The Municipal Council of Walsingham*, 596.

By-laws passed to impose rates, under 4 & 5 Vic. ch. 10 & 12 Vic. ch. 81 — Quashed.] — 5. By-law quashed:—1. As contrary to the 4 & 5 Vic. ch. 10, in not limiting the sum to be raised, and in imposing a tax on wild lands alone: 2. As exceeding the authority given to the district councils by the 48 section of that act: 3. As inconsistent with the requirement of 12 Vic. ch. 81, in not specifying the sum required, or the purpose to which it was to be applied. [And *semble* that it is necessary under this act (sec. 41, sub-sec. 22), as it was under 4 & 5 Vic. ch. 10, that the sum to be raised should be specified in the by-law, and then a rate authorised for raising it]: 4. For taxing certain townships for specified sums, without shewing for what purpose the money was required. *Tylee* v. *Municipal Council of the County of Waterloo*, 681.

By-law repealed and revised — No sum limited—Quashed.]—6. A District Council passed a by-law imposing a tax on certain lands, but limiting no sum to be raised. By two subsequent by-laws this was repealed and again revived. *Held*, that the last by-law must be quashed, notwithstanding that the applicants had paid part of the tax imposed by the first. *The Canada Company* v. *The Municipal Council of the County of Oxford*, 679.

Municipal Corporation Act, 12 Vic. ch. 81, clauses 155, 192—Power of court to quash by-laws—Notices —Orchards.]—7. Under the 155th and 192d clauses of the Municipal Corporation Act, 12 Vic., ch. 81, this court has the power of quashing a by-law, not only for some illegality appearing upon the face of it, but also where as a matter of fact the by-law has been made in such a manner as it is enacted by the 192d clause it shall not be lawful for any municipal corporations to make it. In this case, under the facts mentioned in the affidavits, as stated below, the court refused to quash a by-law for changing a road, on the grounds—1st that notices had not been put up as the act requires; and 2dly, that the applicant had not given his consent to the road passing through his orchard. Corporations should be careful to preserve proof of regular notices, by affidavit of persons employed to put them up. *In re Lafferty* v. *Municipal Council of Wentworth and Halton*, 402.

Authority of a judge in Practice Court—Construction of 12 Vic., ch. 81, sec. 155.]—8. A judge in Practice Court has no authority to entertain an application for quashing the by-law of a corporation. As to titles of city corporations under 12 Vic., ch. 81, "Corporation of Toronto" insufficient to designate the Corporation of the City of Toronto.—See 10 U. C. R. 492. By 12 Vic., ch. 81, sec. 155, Corporations have not less than eight days to answer a rule *nisi* for quashing any of their by-laws. Therefore, a rule granted and served on the first Saturday in term is not returnable within that term. *In re Sams* v. *The Corporation of Toronto*, 577.

4 & 5 Vic., ch. 10—By-law bad for want of certainty.]—9. Under the authority of 4 & 5 Vic., ch. 10, a by-law was passed by the District Council, 30th June, 1848, establishing as a public road, "The road laid out by J. E. surveyor, between, &c., as appears by his report, bearing date, &c.;" but it did not refer to the

report as annexed, neither was the line of road set out, nor the width stated in the by-law. *Held*, that the by-law was deficient in necessary certainty, and must therefore be quashed. *In re Brown* v. *The County of York*, 454.

By-laws passed under 4 & 5 *Vic., ch.* 10—*Necessity for statement of the purpose for which money required—Land need not be separately charged, or taxed by the acre.*]—10. A by-law passed under 4 & 5 Vic., ch. 10, for raising a rate, stated that the money was required to pay off £1500 due to the Gore Bank, and £500 due by the District to A. D. *Held*, sufficient, and that it was not necessary to state for what services the money was due, for the court would intend that the debts were legally contracted and for a legal purpose. Under the above statute, land must have been taxed at so much in the pound on its assessed value; and it was not necessary that a by-law should charge upon land separately a distinct proportion of the sum authorised to be levied. *Tylee* v. *Municipal Council of the County of Waterloo*, 685.

Quashing by-law—Costs of—After application.]—11. The 35th section of 14 & 15 Vic., ch. 109, has not a retrospective operation; and the court therefore discharged a rule calling on the defendants to pay the costs of an application on which a by-law had been quashed before the passing of that act. *Brown* v. *The Municipal Council of the County of York*, 636.

*By-law—objections to not apparent on the face—mode of imposing rates for county purposes—*12 *Vic., chaps.* 78 & 81—13 & 14 *Vic., chaps.* 64 & 67—14 & 15 *Vic., chaps.* 109 & 110.] —12. It is not necessary that a by-law to raise money for county purposes should contain all the provisions required to perfect the measure; and, therefore, the same by-law which provides for raising the loan and imposing the rate, need not apportion the sums to be paid by each municipality, for that may be provided for by a subsequent by-law. A by-law imposing a rate for county purposes, to be levied on the *actual* value of all taxable property in the county is not objectionable, though in villages, &c., the taxes are directed to be levied on the *annual* value, for such direction is intended only to apply to rates imposed for their own purposes. The court is not bound under the act to quash a by-law, unless it appear illegal on the face of it. Where it is attempted to be proved so by extraneous evidence, it may be discretionary with the court, upon such evidence, when acting under their common law jurisdiction, to say whether the by-law shall stand or not. *Grierson* v. *The Provisional Municipal Council of the County of Ontario*, 695.

Quashing by-law of municipal council for the appropriation of money for roads—Entitling of rule nisi.]—13. *Held per Cur.*—That the by-law passed by the Peterborough Municipal Council under the provisions of our act, 12 Vic. cap. 81, sec. 41, 11th and 16th heads appropriating £600 from the county funds of the county of Peterborough, to be expended on certain roads within the said county in such manner as may be deemed most proper by the commissioners appointed for that purpose, &c., is illegal, as exceeding the authority given to the council, and that the rule nisi for quashing it must be made absolute. The entitling of the rule to quash the by-law of a municipal council need not be *The Queen* v. *The Council*, but as in the matter of *A. B. and the Council. In re Conger and the Municipal Council of the County of Peterborough*, 428.

Alteration of roads—By-law of Municipal Council—12 *Vic. cap.* 81, *secs.* 31, 189.]—14. A municipal council in passing a by-law for the alteration of an old road, described the point of commencement of the new road as being "*about eight chains* south of N. W. corner, &c." The court held that in the absence of any ground for exceeding or coming short of the *eight chains*, the road was to commence at a point *eight chains* south, &c., and that the objection of the uncertainty of the point of departure of the road was not an objection sufficiently strong to warrant them in setting aside the by-law; but *held*, that the by-law was bad for not assigning *any width* to the new road, and it was therefore set aside, but without costs. *In re Smith and Municipal Council of Euphemia*, 398.

Road Act, 12 *Vic. cap.* 84—*Necessity of complying with conditions of Act to entitle Company to sue for calls.*]—15. It is only when *the conditions* mentioned in the Road Act, 12 Vic. cap. 84, have been truly *and in fact* complied with that the persons associated together can be *incorporated*, and sue, in the short form given by the act, stockholders for non-payment of calls; and *held per Cur.*, that upon the facts of this case—the plaintiffs not having *bona fide* paid in the six per cent. on the capital subscribed, or registered the certificate as the act required—could not sue the defendant, as a corporate company under the act, for the non-payment of calls upon his stock. *Niagara Falls Road Company* v. *Benson*. *Same* v. *Hamilton*, 415.

Public road—How far gate thrown across it is conclusive as to road being public.]—16. The placing a gate across a travelled road after the public have been enjoying it for upwards of twenty years, can never have the effect of abolishing a highway. *Semble*, that a gate being kept across a road is not in any case *conclusive* as to the road being a public one—the gate may have been there for the purpose of preventing cattle straying. *Johnston* v. *Boyle*, 370.

CLERKS.

Assessment Rolls—Clerks of the Peace—Clerk of Council—Remuneration.]—1. *Held per Cur.*, That under the authority of the 4th & 5th Vic., ch. 10, District Councils may pass by-laws providing that the assessment rolls and statute labor lists, formerly prepared by the Clerks of the Peace, shall in future be prepared by the Clerks of District Councils, and that they be remunerated therefor. *Semble*, however that the Councils may, if they think proper, still allow these duties to be performed by the Clerks of the Peace—in which case, they will be entitled to the compensation. *Baby* v. *Baby*, 182.

2. A clerk of the peace cannot charge fees for any service, for the remuneration of which no provision is made by Statute or otherwise, and the payment of such fees by a District Council in accounts rendered for services in former years, will not prevent their afterwards disputing the charges in the accounts of subsequent years. If a clerk of the peace accept a salary in lieu of all fees, he is not afterwards entitled to any remuneration except such salary, and an action will not lie against the District Council for fees charged for services performed by a clerk of the peace. *Askin* v. *London District Council*, 6.

COMMON CARRIERS.

Common carriers by water—Exception against dangers of navigation.]—1. Where an exception against loss by dangers of navigation is con-

tained in a bill of lading, and the vessel is in fact lost in a storm, the evidence of negligence or improper conduct must be very clear in order to make the ship owner liable; and although it lies upon the defendant in the first place to bring himself within the exception, yet this is sufficiently done by shewing a shipwreck from stress of weather; and the plaintiff is then called upon to establish that the loss would not have happened but from negligence or want of skill. *Harnden* v. *Proctor*, 688.

Implied liability of stage coach proprietor for loss of letter containing a promissory note—Commencement of suit—Ca. Re. issued before six years, not returned—alias Ca. Re. issued after.]—2. *Held pur Cur.*, that the stage coach proprietor (who was also the contractor for carrying the mail) was not liable under the facts of this case (as given below), for the loss of a letter containing a promissory note. *Quære*—Is the Statute of Limitations saved by a writ having been issued before the expiration of the six years, though the defendant was not served with such writ, but had been served with an alias writ issued after the six years had expired, and though the first writ had not been returned until after the six years had expired? *Holman* v. *Weller*, 391.

COMMON SCHOOLS.

See PLEADING.

1. Under the Common School Act 7 Vic. ch. 29, the trustees of any school district might make a valid agreement with the teacher of the school for the district, to give him the whole allowance appropriated for such school district for the year when the act came into force, even if the teacher served for only three months. *Darby* v. *Earl*, 36.

2. A county superintendent of common schools, signing together with the trustees a contract with a teacher, will be considered to have signed the same only as approving the appointment, and in pursuance of the direction of the statute and not as a party contracting with the teacher. *Campbell* v. *Elliot et al.*, 52.

Schools—Local Superintendent—Collector—Right to sue—Penalties.]—3. A township superintendent of Common Schools, appointed under the Act 7 Vic. ch. 29, since repealed by the Act 9 Vic. ch. 20, sec. 45, has since such repeal no legal authority to sue the collector of the township for monies received by him, not in the nature of penalties. *Shirely, Supt. of Common Schs.* v. *Hope.*

Municipal Council—Com. School Books—Power of officers to bind Corporation.]—4. The clerk of a district council can only charge the council by such acts as are within the scope of his general authority, or by such as the council either directed beforehand, or afterwards sanctioned, either expressly or by availing themselves of, to their advantage. The district council have no power to authorise their clerk or agent to make any contract for the purchase of books for the several common schools throughout the district—such a contract "not being necessary for the exercise of their corporate functions." *Ramsay et al.* v. *The Western District Council*, 112.

School trustees—Teacher—Contract—Personal liability.]—5. School trustees acting under the statute 9 Vic. ch. 20, cannot be sued as individuals upon any contract made by them under the statute as trustees, as by such statute they are made a corporation, and enter into contracts as such. *Sheriff* v. *Paterson et al.*, 147.

School trustees — Teacher — Contract—Individual liability—Pleading.]—6. The plaintiff charged the defendants upon a special agreement, stated to have been made by them as trustees, to furnish with fuel, when required, the plaintiff, a school teacher under the act 9 Vic. ch. 20. To this declaration the defendants demurred, on two grounds: 1st, because no request, with time and place, had been laid in the declaration to furnish fuel; 2ndly, because the defendants, having made the agreement stated in the declaration in their corporate capacity, were not liable as individuals, but had been so charged in the declaration. *Held, per Cur.*, declaration bad — upon both grounds of demurrer. *Anderson* v. *Vansittart et al.*, 145.

School trustees — Teacher — Disturbing school—Right to use—School property.]—7. Under the 44th sec. of the 7th Vic. ch. 29, the trustees of the public school (and not the schoolmaster) should be made the plaintiffs in an action of trespass to the school-house; unless at least it can be shewn that the trustees have given the school master a particular interest in the building, beyond the mere liberty of occupying it during the day for the purpose of teaching. *Monaghan* v. *Ferguson et al.*, 67.

Misjoinder of counts—Demurrer—Arrest of judgment—Liability of trustees to teacher, under School Act 9 Vic. ch. 20—Necessity of contracting specially with teacher under corporate seal.]—8. *Held, per Cur.*, that the 1st special count in this declaration (given below) was in assumpsit, and the 2nd in tort, and that there was therefore a misjoinder of counts. A demurrer for a misjoinder of counts must go to the whole declaration; where therefore the defendant demurred to the 2nd count of a declaration, and the plaintiff demurred to the pleas to the 1st count—*Semble*, that upon the argument of the demurrers, the plaintiff could not object on exceptions taken to the 1st count of the declaration, that the whole declaration was bad for misjoinder of counts. In an action of assumpsit brought by a teacher, against the school trustees appointed by the act 9 Vic. ch. 20, setting out a special agreement to retain the plaintiff in the employment of a teacher, for one year, from, &c., at a certain salary, &c., and also on a special action on the case, founded upon a parol agreement brought by the teacher, under the same statute, for wrongfully and without cause turning the plaintiff away, and preventing him thereby from earning his salary, it was *Held, per Cur.*, that the declaration in both cases was bad, in not averring the agreement to have been made with the defendants by their corporate seal. If the school trustees appointed under the act 9 Vic. ch. 20, decline to sign the order upon the superintendent for the payment of the teacher's money, as provided for by the act, they may be proceeded against by mandamus, or perhaps they may be sued in a special action for not making the order, but they cannot be sued in an action for the money, as that is not in their hands. *Semble*, that the school trustees have no power under the act to make an agreement for providing the teacher with board and lodging. *Quinn* v. *the School Trustees*, 211.

Mandamus — School estimate — Trustees in towns and townships.]—9. The school trustees of towns, under 13 & 14 Vic. ch. 48, sec. 24, have unlimited discretion as to the number of schools to be kept up, and are not subjected to the restrictions in this respect imposed upon the school trustees for townships. Where an estimate of the sum required for school purposes for a

certain year was sent to the town council by the school trustees, and the council recognized such estimate by paying a portion of the amount, and submitted to the court their reasons for refusing to pay the balance, *Held* that they were precluded from objecting that the estimate was not laid before them as by law required. *Brockville School Trustees* v. *the Town Council*, 592.

School trustees—Municipal Councils—Rate for school house—Mandamus.]—10. K. was employed in 1848 by the trustees of school section No. 4 in the township of Sandwich, acting under a by-law of the District Council, to furnish materials for and to erect a school house in that section. Part of the money was paid to him on account, and for the balance he brought an action against the trustees, and recovered judgment. Finding no property of theirs on which to levy, he applied in 1850 to the Municipal Council of the Township, who passed a by-law imposing a rate to satisfy his judgment: this by-law was afterwards repealed before the money had been collected. It appeared that under the original by-law of the District Council, the rate for erecting the school house had been levied, and the part not paid over to K. had been handed to the secretary-treasurer of the trustees, who absconded: and that K. was in possession of the school house, and retained it for the money due him. Under these circumstances the Court held that the Township Council were not liable, and discharged a rule for a mandamus to them to pass a by-law for raising money to satisfy the claim. *Semble* also, that if the applicant were entitled to recover, an action would lie against the Council, and therefore no mandamus should go. *Kennedy* v. *the Municipal Council of the Township of Sandwich*, 605.

Election of school trustees—13 & 14 Vic. ch. 48 — "Taxable Inhabitants," meaning of.] — 11. Persons who are rated only for statute labour, and are not householders, are not "taxable inhabitants" within the meaning of 13 & 14 Vic., ch. 48, sec. 22, and cannot therefore vote at the election of school trustees. *Quære* whether the 5th and 7th clauses of that act apply to the electors of school trustees for towns, or only to those for townships — *Semble*, that the 7th, at least, applies to both. *The Queen ex rel. McNamara* v. *Christie and Painter*, 741.

CONSTABLE.

Constable—Town and County jurisdiction — Powers.]—A constable of any town within the county in which a warrant of attachment is issued under 12 Vic., ch. 60, sec. 1, has authority to execute such warrant. *Delany* v. *Moore*, 590.

CONVICTION.

12 *Vic., ch.* 81, *secs.* 72, 185—*Quashing conviction by Mayor under Act.*]—1. *Held per Cur.*—That the defendant, appearing on the evidence returned *bona fide* to have asserted a claim to the land which he had enclosed, it was not a proper case for the adjudication of the mayor (of Belleville) nnder the 72d or 185th clause of the statute 12 Vic., ch. 82. and that, consequently, the mayor's summary conviction of the defendant under that act might be quashed by certiorari. *The Queen* v. *Taylor*, 409.

Conviction by Magistrate quashed—Tolls of Albion Plank Road, when to be collected.]—2. *Held, per Cur.*, that the following conviction —"Home District, to wit.—Be it remembered, that on the 16th day of January, in the year of our Lord

1849, at the City of Toronto in the district aforesaid, Thomas Haystead is convicted before me, S. G. Lynn, one of her Majesty's justices of the peace for the said district, for that he, the said Thomas Haystead, did, on the 4th day of January, inst., evade payment of toll at the toll-gate situated on the Vaughan branch of the Albion planked road; and I, the said justice, adjudge the said Thomas Haystead, for his said offence, to forfeit and pay ten shillings, and also to pay the sum of thirteen shillings and seven pence for costs; and in default of immediate payment of the said sum to be imprisoned in the gaol of this city for the space of one month, unless the said sums shall be sooner paid; and I direct that the said sum of ten shillings shall be paid to the Albion Road Company; and I order that the said sum of thirteen shillings and seven pence for costs shall be paid to me the convicting justice. Given under my hand and seal, &c."—was bad, in omitting; 1st. Any statement of the information. 2ndly. The summons and appearance or default of the accused. 3rdly. His plea denying or confessing. 4thly. The evidence. *Also*, in not shewing that any toll was claimed—or what toll—or how imposed—or that any could be claimed or imposed by reason of the completion of the road, or of any part of it. *Also*, because it did not appear therein that the defendant had proceeded on the road with any carriage or animal liable to pay toll, and after turning out of the road had returned to or re-entered it, with such carriage or animal, beyond a toll-gate, without paying toll, whereby payment was evaded. *Semble*, that tolls on the Vaughan Branch of the Albion Plank Road can only be collected when the road is made, according to the requisition contained in the 23rd sec. of statute 9 Vic., ch. 88. *The Queen* v. *Haystead*, 235.

COUNTY COUNCILS.

See ASSUMPSIT—ACCOUNT STATED.

Mandamus—Building Court House.—The Court refused a rule nisi for a mandamus, at the instance of the Justices of the Huron District to compel the Huron District Council, to build a court house. *Justices of Huron Dist.* v. *Huron Dist. Council*, 136.

A Municipal Council can, in their corporate name, enforce payment of debts due to the District, where neither the magistrates nor their treasurer could have sued formerly; but they cannot vary or abridge the rights of the parties, or alter any contract express or implied. *Ottawa District Council* v. *Low et al.*

CROWN LANDS.

Trespassers on Crown Lands—Ejectment by vendee of Crown—Agent's receipt for land—Power of Government to cancel their contract with vendee after receipt—3 & 4 *Vic., ch.* 78, *sec.* 31; 4 & 5 *Vic., ch.* 100, *sec.* 18; 12 *Vic., ch.* 31, *sec.* 2, 3.]—The plaintiff in 1846 purchased some Clergy Reserve Land from a government agent, and obtained from him receipts for partial payment. The defendants were then living on the land, and had been living there since 1840, having made valuable improvements. On the 2nd August, 1849, an order in council was made, that on defendants making the required payments, plaintiff's money should be returned to him, and the sale to him cancelled. When the present action was brought, an order of the Executive Council was made 6th August, 1850, recommending that the Attorney General be authorised to defend the suit. *Held*, that at the time plaintiff received his first receipt from the government agent defendants being mere intruders on Crown Lands, he acquired a right to

eject them under 12 Vic., ch. 31, sec. 2, and that the Crown could not at its pleasure divest him of that right, nor change a wrongful occupant into a rightful occupant, to the prejudice of their own vendee. *Doe dem. Henderson* v. *Seymour et al.*, 508.

DAMAGES.

Liability of District Council to individuals for not keeping steps of District Court House in repair—statute 10 & 11 *Vic. ch.* 6.]—Under the provincial statute 10 & 11 Vic. ch. 6, *a District Council* cannot be made liable in damages for an injury, resulting in death, occasioned to an individual in walking up the Court-house steps, which has been allowed to fall into an unsafe and dangerous condition. The council was charged in this declaration as having the Court-house under their control and as bound by law to keep it in repair; and judgment was arrested on this averment, as the act 4 & 5 Vic. ch. 10 sec. 46, throws the responsibility of keeping the Court-house in a proper state of repair on the district surveyor, upon whose report in the first instance, as to the necessity of the repair and the expense, the Council have to pass a bye-law. *Quære*—Would the Council be liable to an individual for not passing such a bye-law after the report of the surveyor had been submitted. *Hawkeshaw* (*Administ.*) v. *Dalhousie District Council*, 249.

DEBT.

As to debt lying against the Township Council for expense of a survey made under the 38 *Geo. III., chapter* 1.]—*Held per cur.*—That the Township Council of Hamilton coming in the place under the 12 Vic. ch. 81, sec. 31, heads 26 and 31, of the justices of the Newcastle district in quarter sessions assembled could not be held liable in *debt* to the surveyor who had been appointed under the 38 Geo. III., chapter 1, to re-survey the township of Hamilton. *Roach* v. *Municipal Council of Hamilton*, 399.

DEDICATION.

What constitutes a dedication of land to the public.]—A dedication of land to the public use takes effect from the intention of the person making it; and the merely opening or widening a street for the convenience or benefit of the person doing it, and permitting the public to use it, will not constitute a dedication. The question of dedication or no dedication must now be left as a question of fact for the jury. *Beford* v. *Haynes.*

ELECTIONS.

Township Council Act, 12 *Vic., ch.* 81—*quo warranto—right of relator to attack the existence of council by a quo warranto in one proceeding against every member of council by name.*]—1. It is not permitted to private relator under our Act 12 Vic., ch. 81, either to attack by writ of summons in the nature of a *quo warranto*, the Township Council by name, upon grounds which, if sustained, must necessarily lead the dissolution of the body, or to attack the whole Council in one proceeding, through the individual names of every member of it. *The Queen ex rel. Lawrence* v. *Woodruff*, 424.

Mandamus — Treasurer — Councillor — Incompatible office—Books of Corporation.]—2. At a session in Oct., 1846, A. was elected by the District Council of the Midland District, treasurer of the district; when elected A. was himself a district councillor; B. at the time of A.'s election was holding the same office

of treasurer to the district, having been long previously appointed to that office by royal commission. A. upon his election requested B. to give him the books, &c., of office. B. refused upon the grounds, that under the District Councils Acts 4 & 5 Vic., ch. 10, and 9 Vic., ch. 40, A. had been elected treasurer at a time and session when by law no such election could take place; and that the two offices of district councillor and treasurer were incompatible. Upon B.'s refusal A. applied to the Court for a mandamus to B. to deliver the books, &c. *Held, per Cur.*, 1st, that A. had been elected at the proper time and session. 2ndly, that the two offices were incompatible. 3rdly, that A. was ineligible for election, the council having no power to receive his resignation as councillor. 4thly, that notwithstanding A.'s irregular election, he, as the treasurer *de facto*, under the Act 9 Vic. c. 40, had a legal right to the books, &c., of his office: and that a mandamus might go to B. for the delivery of the books, &c., to A., he being since A.'s election under the act a mere stranger to the office. *The Queen* v. *David J. Smith, Treasurer of the Midland District*, 101.

Contested election—Notice of disqualification—New evidence.]—3. It is not necessary that the statement of facts, placed before a judge when a municipal election is questioned, should contain all the grounds on which the relator relies to entitle him to the seat, if the election should be set aside. If there be a disqualification rendering a candidate ineligible, proper notice of it must be given at the time of election. No new evidence will be received by the court on the examination of a decision of a judge in chambers as to a contested election. *Semble*, That whether the court, or a judge before whom the relator brings his case, will go further than declare the election of the defendant void, or will proceed as well to seat the relator, is a matter of discretion not to be interfered with on appeal, (per C. J.) *The Queen ex rel. Clark* v. *McMullen*, 638.

Ineligibility of collectors of taxes under 1 Vic. ch. 21, sec. 18—Application for a quo warranto by a person evidently disqualified for the office.]—4. Under section 18 of the statute, 1 Vic. ch. 21—a collector of rates who has not paid over the amount collected by him, and settled his accounts with the treasurer on or before the third Monday in Dec. of the year for which he has been serving—is ineligible to any township office. The court refused an information in the nature of a *quo warranto*, with a view to place a party in the office of a township clerk, who, in making his application, shewed that he could not write. *The Queen* v. *Ryan*, 203.

Quo warranto—Interest of relator—Qualification for alderman for the Town of Kingston—Judgment need not award new election—9 Vic. ch. 75; 12 Vic. ch. 80; 12 Vic. ch. 81; 13 & 14 Vic. ch. 64—Rules of Court Michaelmas Term, 1850.]—5. A relator is not necessarily bound to prove his interest, unless the defendant question it by denying it, and shewing, or at least alleging some ground for his denial. The judge's order is not defective, because it does not award that a new election be held. Although the statute 9 Vic., ch. 75, has been repealed, yet so long as no new assessment law is passed, the same residence is a necessary qualification for an alderman as formerly. *The Queen ex rel. Henry Bartliffe* v. *James O'Reilly. The Queen ex rel. Henry Bartliffe* v. *John Shaw*, 459.

Municipal election—Mode of proceeding—Quo warranto—Pleading.—6. At a township meeting the first duty of the meeting is to elect a district councillor, and the town clerk *ex officio* may preside as chairman of the meeting until such councillor be chosen. The court therefore refused, upon an information in the nature of a *quo warranto*, to disturb the seat of a councillor who had been elected by the meeting, though under protest at the time by some of the electors, because the town clerk had insisted upon acting *ex officio* as chairman. *Small, Coroner, &c., on the relation of Walker* v. *Biggar.*

EVIDENCE.

See SALE FOR TAXES.

Statute passed reversing attainder except as to lands already forfeited and sold—Effect of, on proof required from parties claiming under the traitor—Mere date of will being thirty years old, not sufficient to dispense with proof—13 & 14 *Vic., ch.* 63.]—1. A statute was passed reversing the attainder of A. S., and taking away the forfeiture wrought thereby, so far as it might affect such portions of his estate as had not been already declared forfeited, and been sold under authority of law, and vesting such estate in those who could claim it if he had not been attainted; provided always, that nothing in the act contained should affect any property sold or conveyed by the Commissioners of Forfeited Estates, or any public officer acting for the Crown in that behalf, but that such property should remain as if the act had not been passed. In the preamble it was recited that a part of the estate had been taken upon inquisition, and seized by the Crown. *Held*, that the plaintiffs claiming as devisees of A. S. must shew, as part of their case in the first instance, that the lands claimed were no part of those forfeited and sold. The mere fact of the date of a will being thirty years old is not sufficient, under all circumstances, to prove that that is the real age of the writing, even if it comes from the proper custody, but some proof must be given of a concurrent possession of the property consistent with it, or of the existence of the will for thirty years. *Doe Stevens et al.* v. *Clement*, 717.

Evidence of party indicted inadmissible.]—2. The defendant on his trial upon an indictment cannot give evidence for himself, nor can his wife be admitted as a witness. *Regina* v. *Humphreys*, 613.

FERRIES.

Right of ferry—Who must sue, grantee of Crown or his lessee—if right be disturbed.]—1. The crown grants a right of ferry to A., who leases, by writing, not under rent, to B. C. disturbs the right of ferry, and B. brings an action on the case against C. for such disturbance; but, *held, per Cur.*, that the plaintiff B. must be nonsuited, the right to sue being in A. the grantee of the franchise, and not in B. who, if he is interfered with, must look to A. and not to C. *Higgins* v. *Hogan.*

2. The Provincial Act 9 Vic., ch. 9, as well as the common law, authorise a person to make use of his own boat, *within the limits of a ferry*, in the pursuit of his business or pleasure, freely and without any necessity of shewing the particular motives or occasions he may have for allowing any individual to pass in his boat, provided such person be not a traveller, and provided nothing be charged for carrying. *Ives et al.* v. *Calvin*, 63.

FIRE.

A person kindling fire on his own land for the purpose of clearing it, is

not liable at all risks for any injurious consequences that may ensue to the property of his neighbours. *Dean* v. *McCarty*, 18.

FOREIGN JUDGMENT.

Foreign judgments — Pleading — Want of process—Montreal Mining Company—Liability for calls—Penalty for not paying.]—The first count of the declaration was on a judgment of the Superior Court of Montreal. Defendant pleaded that he was not at any time served with any process issuing out of the said court, at the suit of the plaintiffs, for the causes of action for which the said judgment was obtained; nor had he at any time notice of any such process; nor did he appear in the said court to answer the said plaintiffs; *Held* bad on demurrer, inasmuch as the pleading did not shew that the proceedings were so conducted as to deprive the defendant of the opportunity of defending himself. The second count was for calls on certain shares in the stock of the said company. *Plea*—that defendant was not at the time of action brought, nor is he the holder of the said shares or any of them: *Held* bad on demurrer, inasmuch as it assumed that if a person ceased to be a stockholder after the call was made he would no longer be liable; whereas the provision in the statute 10 & 11 Vic., ch. 68, sec. 13, is expressly otherwise. *Montreal Mining Company* v. *Cuthbertson*, 521.

HIGH WATER.

See TRESPASS — INJUNCTION—OVERFLOWING LAND.

INDIAN LANDS.

Grant of Governor under his seal at-arms—Power of chief of an Indian tribe to act as agent for the tribe—Power of Commissioners of forfeited estates—59 Geo. III., ch. 12—Inquisition void for want of certainty—Description in conveyance—Meaning of phrase "more or less."]—A grant of lands, in 1784, by the then Governor of the Province of Quebec, &c., under his *seal-at-arms*, to the Mohawk Indians and others, conveyed no legal estate; first, as not being by letters patent under the great seal; secondly, for want of a grantee or grantees capable of holding. *Held*, also, that the mere fact of a chief of an Indian tribe assuming to act as a duly authorised agent in the name and on behalf of the tribe, showed no power in him so to act; and therefore, that a lease, signed by him as agent, &c., conveyed nothing. And consequently, that such lessee had no estate which, on his being subsequently attainted of high treason, could be forfeited to the Crown, and vest in the commissioners of forfeited estates, under 59 Geo. III., ch. 12. Though by the 33 Hen. VIII., ch. 20, the Crown, in case of attainder for high treason, would be deemed in actual possession without any inquisition of office, yet such lands only would vest in the commissioners under 59 Geo. III., ch. 12, as should be found by an inquisition to be vested in the Crown, and therefore no more land could possibly pass by a deed from the commissioners than the inquisition had found the traitor seized of. And *held*, that the inquisition could not support the conveyance which the commissioners made; for it referred to nothing which could supply proof of identity, and the commissioners were not warranted in going beyond the inquisition. And *semble*, that the inquisition was void for want of certainty. *Doe dem. Sheldon* v. *Ramsay et al.*, 531.

INJUNCTION.

Practice—Injunction—Rights of riparian proprietors—Laches.]—An

averment, that the soil of a stream is vested in the crown, does not import that the crown has therefore any power to interfere with the rights of riparian proprietors. There are many cases in which the court will interfere by injunction to maintain things *in statu quo, pendente lite*, not only where the title of the plaintiff to relief is unquestioned, but even where that title is doubtful; provided the court sees that there is a substantial question to be settled. But the court does not interfere by special injunction against a party in possession claiming adversely to the plaintiff; nor, on the other hand, will the court, as a general rule, so interfere in favor of a party in possession, to restrain a casual trespass. On an application on behalf of the Crown for a special injunction, it appeared that the acts and threats complained of occurred eight and eleven months before the filing of the bill, and the motion for the injunction was made twelve months after the answer came in. *Held*, that the application was too late. *Attorney General* v. *McLaughlin*.

INNKEEPER.

Innkeeper and traveller—When it can be said the relation ceases to exist—As to averment in declaration of the existence of such relation at the time of turning away the traveller from the inn, after verdict.]

Where a traveller is shewn to have come to an inn as a guest—to have been so received by the landlord—to have staid there six weeks, and to have paid for his board by the week, two days in advance: Held *per Cur.*, that if dismissed abruptly without cause, he has, under these circumstances, a right of action against his landlord, on the common law relation of innkeeper and guest. To put an end to this relation, the traveller must be shewn to have rented a certain apartment in the inn as tenant for a certain term. Where the declaration avers that the plaintiff came as a guest and was so received—the intendment after verdict will be that the relation thus begun continued till it was interrupted by the wrongful act of the defendant, nothing being stated to the contrary.—*Whiting* v. *Mills*, 200.

INSURANCE.

See ARBITRATION.

JOINT STOCK COMPANY.

Harbour Company—Transfer of Stock—Refusal of Secretary—Right of action.]—In an action against a harbour company for refusing to register a transfer of stock by one S. to the plaintiffs. *Held*, that although S., being president of the company, might perhaps have registered the assignment himself, yet that the refusal of the secretary to do so formed a good ground for an action against the company. *Held also*, that the company had no legal lien on the stock for harbour tolls due by S. to them, and could not, therefore, on that ground refuse to register the assignment. *Held also*, that registration in the books of the company was necessary in order to complete the transfer. *Held also*, as to four shares of which there appeared only an entry of credit to S. in a ledger, but which were not standing in his name in the stock book, that the plaintiffs were entitled to recover in respect of such shares. *Held also*, as to the shares for which the plaintiffs were entitled to recover, that they were strictly entitled only to their value at the time of demand and refusal to transfer: but the jury having allowed a larger sum, and this question not having been pressed on the argument, the court did not reduce the verdict. *McMurrich* v. *Bond Head Harbour Co.*, 609.

JUSTICES OF THE PEACE.

See ASSUMPSIT.

Liability—Joint or several.]—1. Justices of the Peace before whom a conviction is made, are not jointly liable, under 4 & 5 Vic. ch. 12, for not returning the same. *Metcalfe q. t. Reeve*, 583.

Pleading.] — 2. A declaration, charging that the return was not made to the next ensuing quarter sessions of the peace is bad, the statute requiring a return to the next ensuing general quarter sessions. *Ibid.*

LICENSES.

Billiard tables—Duty imposed on by town of London, under Act of Incorporation—Provincial duty—Recovery of penalty—In what form of action—Sufficiency of averments in declaration.]—1. *Held per cur.* That a by-law of the corporation of London, passed under the authority of the statute 10 & 11 Vic., ch. 48, and providing "that every owner of a billiard table, shall pay £10 per annum for a license to keep the same," had not the effect of abrogating the duty imposed on billiard tables by the provincial act 50 Geo. III., ch. 6, but must be considered as a regulation superadded for the purposes of the town of London. *Held also*, that an action of debt would lie for the penalty, on the statute 50 Geo. III., ch. 6. *Held also*, that in an action for the penalty, it need not be averred that the defendant had not paid the penalty. *Also*, that it need not be averred in the declaration, that the defendant kept the table without having first obtained a license from the inspector of licenses—that he did so without having first obtained a license, is sufficient. *Also*, that it need not be averred that the offence was committed after the 29th September, 1810. *Semble*, that the statutes 3 Vic., ch. 9, and 3 Vic., ch. 20, do not apply to any person merely setting up and keeping a billiard table for hire, not being at the same time a keeper of an inn or a house of public entertainment. *Church qui tam* v. *Richards*, 00.

Mandamus — Tavern licenses — Right of municipality to retain.] — 2. Mandamus granted, directing the Board of Police of Niagara to pay over to the Inspector of Licenses the sum of £240, received by the clerk of the board for tavern licenses, for 1846 and 1847: the court deciding that under the 17th sec. of 8 Vic., ch. 62, and the 3rd and 4th secs. of 8 Vic., ch. 72, the government, and not the town of Niagara, were entitled to receive the dues upon such licenses. *The Queen* v. *The Niagara Board of Police*, 72.

3. Mandamus refused which had been applied for for the purpose of directing a magistrate to revoke a certificate granted by him at an adjourned Quarter Sessions authorising the issue of a tavern license to A. B., for keeping a tavern in the Township of Vaughan—the said certificate of license having been granted in contravention of a by-law of the Municipal Council of Vaughan—no sufficient proof of the by-law having been given. *The Queen ex rel. Gamble* v. *Burnside and Morgan.*

LIMITATIONS (STATUTES OF).

Statute of Limitations 4 William IV., ch. 1—Possession held under an erroneous idea as to boundary.] —1. Under the Statute of Limitations 4 Wm. IV., ch. 1, a possession inadvertently held under an erroneous impression as to boundary, with no intention of claiming the land otherwise than as it was supposed to form part of a certain lot covered by the party's deed would by mere

lapse of time ripen into a title. *Doe dem. Taylor and wife* v. *Sexton*, 413.

Accidental overplus, not covered by deeds—Ejectment for, by patentee—Statute of Limitations—Discontinuance and adverse possession.]—2. The plaintiff, being the patentee of a 200 acre lot, sold to one T. the rear 50 acres, and afterwards "the front three quarters" to one K. Supposing that he had parted with all his land, he moved off the lot: it turned out, however, that, owing to an error in running the lines, a small surplus, not covered by the deeds, was left between the part sold; and after a lapse of more than thirty years the plaintiff brought ejectment to recover this portion. *Held*, that to enable the Statute of Limitations to run, it was not necessary that K. should have taken possession, imagining that he had bought all not sold to T., and intending therefore to claim and possess the part in question; but that it should have been left to the jury to say whether the plaintiff having been in possession of the rents and profits, had not discontinued such possession, and whether such discontinuance was not more than twenty years before action brought. *Doe dem. Taylor* v. *Proudfoot*, 641.

MEMBERS OF PARLIAMENT.

Pr vilege of members of parliament from arrest.]—Members of the provincial parliament in Upper Canada have the same privilege from arrest as members of parliament in England. One of the defendants, being a member of parliament, was arrested on the 29th of November, 1851, under an attachment issued against him as an attorney for the non-payment of a debt. The last preceding session during which he had been a member expired on the 30th of August, 1851, and that parliament was dissolved on the 6th of November following. On the 10th of December he was again elected, and in February applied to be discharged on the ground of privilege. *Held*, that he was not privileged under the first election, as at the time of arrest he was not a member, and more than forty days had elapsed from the close of the last session; but that he was entitled to his discharge as a member of the new parliament, having been arrested within forty days next before the return of the writ of election. The return at the new election was held sufficiently proved by the affidavit of applicant. *The Queen* v. *Gamble & Boulton*, 668.

NOTICE OF NON-PAYMENT.

Note—Notice of non-payment—Insufficiency of affidavit—Extracts of letter not noticed.]—G. Ross endorsed a note in blank. His agent being asked by plaintiff's agent where he, G. R., resided, gave an erroneous direction, which plaintiff's agent wrote in pencil under the endorser's name. Notice of non-payment was sent to endorser at such supposed place of residence, and *held* that such notice was sufficient. Extracts of a letter, embodied in an affidavit, cannot be noticed; either the whole letter or a copy should be before the court, or at least it should be sworn that the letter contains nothing more relating to the action. In moving for a new trial an affidavit by one of two defendants that he never was served with process or other paper in the cause, nor did any such writ or paper ever come to his knowledge—that he never directly or indirectly retained, employed or authorized the attorney who appeared for both defendants to do so—is not sufficient. He should also have denied knowledge that such a suit was going on. *Vaughan* v. *Ross*.

NUISANCE.

Nuisance—Public navigable water—Pure water—Common Law right.]—A person throwing noxious matter into Lake Ontario, or any other public navigable water, is liable both to an indictment for committing a public nuisance, and to a private action at the suit of any individual distinctly and peculiarly injured.

The right which an individual has to the use of public navigable water in its pure and natural state, is not founded upon the possession of land or of a mill or house adjoining the water, but simply upon the same common law right which every other individual has, to use the water in its unadulterated state, whether he possess lands, mills or houses on its banks or not. *Semble*, that in action on the case, a declaration would be open to special demurrer, in claiming damages for an injury stated to have been committed, or at least continued, after the action had been commenced. *Watson* v. *City of Toronto Gas-Light and Water Company.*

ORDINANCE (OFFICES OF).

Officers of Her Majesty's Ordnance—Their liability to be sued in our courts in their collective capacity.]—The officers of her Majesty's Ordnance, composing a department of the public service existing in England, cannot at the common law be sued in our courts in this Province, in their collective capacity, for an alleged culpable negligence — the remedy against them for any wrong done by the orders or omissions of the board, as a board, can only be by application to the crown. *Lane* v. *The Officers of the Ordnance*, 361.

OVERFLOWING LAND.

Case for overflowing land—License revocable at will not assignable.]—1. W. G., owning lot 24, obtained a parol license from the plaintiff, owner of lot 25, to erect a dam across a stream running from lot 25 through lot 25, and thereupon erected a dam, and, in further consequence of such license, built a mill on said lot, to be worked by means of said dam. The defendant purchased the lot, mill, &c., from W. G., and for the purpose of working the mill upheld the said dam, and thereby overflowed plaintiff's land. Plaintiff brought his action, and defendant pleaded the license to W. G.; and that he (defendant) having purchased the lot, &c., from W. G., for the purpose, &c., upheld the said dam, &c. *Held*, on demurrer (Robinson, C. J., *dissentiente*), plea bad:—1st. Because the license being coupled with the grant of an easement, the grant not being by deed, was void, and the license consequently revocable. 2ndly. Because it was a license, for all that appeared, given to Graham personally, and being revocable was not assignable. 3rdly. Because the right to overflow plaintiff's land was claimed as incident to the possession of the mill on lot 24; but the plea did not show that the right so formed such an incident, either by the manner of its creation or otherwise. *Beaver* v. *Reed*, 555.

Case for overflowing land by draining water back — What the issue on the pleadings.]—2. Case for damming back waters on the plaintiff's land: *Held per Cur.*, that upon the pleadings—as given at length below—the issue was not whether a dam which had been two feet high was made by the defendant three feet high, or being made by others of that height within twenty years was wrongfully continued by him,—but whether the prescriptive right, whatever it might be proved to be, had been exceeded within twenty years to the plaintiff's prejudice. *McNab* v. *Adamson*, 366.

PATENT (MISDESCRIPTION IN).

Patent—Inconsistent description of land granted — Appropriation for clergy reserve, effect of.]—In a patent the land granted was described as "a certain parcel of land in the township of Niagara, containing by admeasurement thirty-five acres, be the same more or less, which said thirty-five acres of land are butted and bounded as follows," &c. It appeared that the boundaries given would embrace about seventy acres, including several lots in the town of Niagara. (From the facts proved it was clear that this was not the intention of the government in making the grant.) *Held*—First, that the description of the land as in the township of Niagara coming first must govern, and the boundaries be regarded as erroneous; and therefore that no land could pass which at the granting of the patent was included in the town. Secondly, it being shewn that in patents bearing date both before and after that to the defendant, the lots claimed by him were declared to be set apart as clergy reserves: that such declaration was conclusive as against the crown, and would prevent the land so appropriated from passing to the defendant, independently of the first objection. *Doe Dem. Campbell* v. *Crooks*, 708.

PLEADING.

See ARREST—ARBITRATION—BOND—BUILDING SOCIETY.

1. To recite certain statutes as statutes of the Province of "Canada," when they are in fact statutes of the former Province of "Upper Canada," is bad on general demurrer. It is also bad on general demurrer, to refer to any statute as having been passed in two of the years (as the 4th and 5th) of Her Majesty's reign. *Huron District Council* v. *London Dist. Coun.*, 89.

2. Where to a plea of justification to the trespasses charged, the plaintiff replied 1st, that the defendant of his own wrong and without, &c., and 2nd, new assigned as for trespasses on another and different occasions, &c., it was *Held per Cur.*, that the replication was not bad as being double. *McKenzie* v. *Gibson*, 358.

Demurrer.]—3. Sufficiency of declaration for calls under the statute 1 Wm. IV. chap. 12. *Marmora Foundry Company* v. *Murney*, 255.

Pleading—Parties.]—4. Where the directors of an incorporated company misappropriate the funds of the Corporation, a bill against them and the company in respect of such misappropriation, cannot be sustained by some of the stockholders on behalf of all except the directors. The company must be made plaintiffs, whether the acts of the directors are void or only voidable, and the stockholders have a right to make use of the name of the company as plaintiffs in such proceedings. Where by the act of incorporation the Government is authorized to purchase the corporate estate on payment of its full value, the Attorney General is not a necessary party to a bill by the stockholders against the directors, complaining of the improper conduct on the part of the latter in dealing with the corporate funds. In such a case, the defendants having answered, admitting certain moneys to have been received by the directors, a motion to pay the amount into court was refused—but the costs of the motion were reserved. *Hamilton* v. *Desjardin Canal Co.*, 463.

Common Schools.]—5. In an action for wrongfully dismissing the plaintiff, a plea averring the dismissal of the plaintiff by a third party authorized by law to do so, is bad, as being an argumentative denial of the wrong

complained of. *Campbell* v. *Black*, 117.

Who proper plaintiff and defendant—12 Vic., ch. 78 secs. 6, 20, 37; 12 Vic., ch. 7, secs. 174, 175.]—The testator having been appointed by the finance committee of the District Council, to collect the wild land tax: *Held*, that his representatives were liable to the council for money received by their authority, and not paid over. Where, subsequently to the commencement of this action, one of three united counties had been set off from the other two, *held*, that the Municipal Council of the three united counties were the proper plaintiffs to bring the action. *The Municipal Council of Lincoln, Welland and Haldimand* v. *Thompson et al., Executors of Poynter.*

PUBLIC ROAD.

12th clause of Highway Act, 50 Geo. III., ch. 1—As to what constitutes a public road running through Indian lands.]—1. The 12th clause of the Highway Act, 50 Geo. III., ch. 1, cannot be taken to mean that every bye-road or short cut used by the Indians across the plains or flats, is to be established as a permanent highway. It only means, that roads which, under the provisions of that act, are to acquire the character of legal highways should have that same legal character where they passed through Indian lands as in other parts of their course, although they might not be (as to such portion of them) public allowances made in any original survey, nor had any public money been expended or statute labor performed on them. *Byrnes* v. *Bown*, 379.

Dedication of a road by tenant—Landlord's acquiescence.]—2. A tenant for years cannot, by acquiescence or otherwise, dedicate a portion of the leasehold for a public highway, so as to bind the reversioner. *Semble:* that where the reversion comes at once, without any interval of time to the tenant, his acquiescence in the dedication, while a tenant, will not bind him, in the absence of evidence of acquiescence in the dedication on the part of his landlord. Where therefore a tenant under the crown had been convicted upon an indictment for taking exclusive possession of the road, after he had obtained his patent. — The court refused to give judgment upon the conviction until evidence had been given to shew the crown a consenting party to the dedication. *The Queen* v. *Wismer*, 200.

RATES.

Where an inhabitant of a corporate town being overrated, pays the overrate to the collector, without at the time making any remonstrance, he cannot afterwards recover back such rate, in an action for money had and received. *Semble*—If he *voluntarily* pays the overrate, even though protesting at the time of payment, he cannot recover it back. *Grantham* v. *The City of Toronto*, 43.

REGISTERED JUDGMENTS.

Registry Act 9 Vic., ch. 34, clause 13—Docketting of judgment—Registry of judgment as to binding lands.]—1. Under the operation of the 13th clause of our Registry Act 9 Vic., ch. 34, lands are bound upon the registry of the judgment—the mistaken reference in the clause to the docketting of judgments in England, being considered by the court a mere false illustration of what was plainly provided for before. *Doe Dem. Dougall* v. *Fanning*, 377.

9 Vic., ch. 34—Registration of judgments to bind lands—Elegit.]—2. The meaning of the 13th section of 9 Vic., ch. 34, is, that judgments

shall bind lands from the date of their registry, not with reference only to remedy by *elegit*, but for the purpose of sale under a *fi. fa.* *Doe dem. Dempsey* v. *Boulton*, 665.

REMUNERATION AND FEES.

Township Councils — Remuneration of members—By-law quashed.]—1. Township Councils have no authority to pass by-laws providing for the remuneration of their own members. *In re Wright and the Municipal Council of the Township of Cornwall*, 633.

A., upon being appointed clerk to the market of the Board of Police of London, enters into a bond for the payment of a certain sum of money in compensation for the market tolls, which the Board allowed him to receive. Being sued on his bond for non-payment of the money, he pleads "that he discovered, after the execution of the bond, that the plaintiffs had no legal authority to erect a market, or make by-laws respecting fees to be taken thereat;" he then avers that they had no such authority, and that on this account the bond is void. *Held*, plea bad in not shewing that no market was erected, or existed, and in not averring that fees were not in fact received by him. *Quære?* Does the Act 3 Vic., ch. 31, give the Board of Police of London power to establish and regulate a market, and appoint fees to be taken thereat? *London Board of Police* v. *Talbot*, 67.

SALE FOR TAXES.

Surveyor General's return of a lot as described for grant—Evidence to rebut this return—Effect of erroneous return where land sold for taxes.]—When the Surveyor General returns a lot of land as described for grant, proof that the land was not in fact so described must be of a very positive and affirmative kind. The mere evidence of a clerk in the Surveyor General's office that he finds no trace of it will not do. *Quære.*—The effect of the Surveyor General having in any case erroneously returned a lot of land as having been described for grant, when in fact it had never been so described, and when in consequence of this error the land has been charged with assessments, and being returned in arrear, has been sold. *Perry* v. *Powell*, 408.

Where taxes were paid to the treasurer of the Home District, on lands situate in the Ottawa District, for the purpose of their being transmitted to the treasurer of the latter district, and the treasurer of the Home District not having so transmitted the amount, the lands were duly advertised for sale, and the plaintiff in order to save the lands paid the taxes to the treasurer of the Ottawa District under protest. *Held*, that he could not maintain an action for money had and received against him to recover them back. *Baldwin* v. *Johnson*, 24.

Sale of land for taxes—Treasurer's Return.—Taxes paid.]—*The Surveyor-General* made a return to the treasurer of the London District, headed thus: "Township of Dorchester, Southern Division, broken front conces. A. & B.—South part to John Reilly, jr., 100 acres; north part to Dudley McPhee, 200;" thus returning the 200 as the north part of broken front concession A. & B., treating it as one tract, and not distinguishing how much was in Concession A., and how much in B. The treasurer did not open his account in accordance with the Surveyor-General's return, charging the assessment against "the north part of 22, in broken front Concession A. and B., 200 acres; but of his own accord opened a separate account against "north half of lot

22, in broken front B. 100 acres," and returned it as in arrear for taxes, upon which return it was sold. It was admitted that if the assessment had been charged against the 200 acres, as returned by the Surveyor-General, there had been always ample distress upon the premises; and it was proved at the trial, that the parties who had paid taxes on the lot having a title to the whole lot of 200 acres, had paid taxes on the whole 200 acres, and not separately on any part of it; *Held, per Cur*— that under these circumstances, the sale of the north half of lot 22 in broken front B., 100 acres, was illegal and void, on two grounds; 1st, because it appeared that, notwithstanding the return made by the treasurer, there was no arrear in fact of taxes subjecting the land to sale; and 2ndly, because at the time of sale, there was a sufficient distress on the premises. *Doe Upper et al* v. *Edwards et al*, 139.

By-law imposing tax on wild lands —Sale of land for arrear of such taxes—4 & 5 *Vic., ch.* 10.]—The Municipal Council of the district of Colborne passed a by-law imposing a tax *per acre* on unoccupied or wild lands, for the purpose of improving the roads and bridges, and liquidating the debt of the district. *Held*, that the by-law was bad, inasmuch as the council had no power to impose a tax for repairing the roads and bridges generally, nor to confine such tax to unoccupied lands only, nor to impose a tax of so much per acre, instead of an assessment of so much in the pound on the assessed value, and the land having been sold for arrears of such taxes, in addition to arrears which had accrued under the statute; *Held*, that the sale was nevertheless void, and that the sheriff's deed was inoperative and conveyed no title. *Quære*, whether the district council could direct and to be sold for payment of taxes, imposed not by the provincial statute but by their by-law? *Doe dem. McGill* v. *Langton*, 524.

Sale for taxes—Sheriff's deed— Payment to Sheriff or Treasurer.]—Ejectment: The defendant proved that on the 19th of June, 1839, he bought the land in dispute at sheriff's sale, and on the 19th of August, 1842, received the sheriff's deed. The plaintiff produced the sheriff's receipt, dated 14th July, 1836, for all arrears of taxes due up to the 1st July, 1835. When this payment was made to the sheriff he held in his hands a warrant to levy the amount due for taxes on the land. The lot was duly advertised by him on the 4th June, 1840, pursuant to the stat. 3 Vic., ch. 46. *Held*, that as the payment was made to the sheriff, and not to the treasurer, the stat. 3 Vic., ch. 46, was not applicable; and that the plaintiff, having shewn an otherwise good title, was entitled to recover. *Doe Dem. Sherwood et al* v. *Matthewson*, 606.

SHARES.

Ship Registry Act, 8 *Vic., ch.* 5, *sections* 18, 16, 21—*Necessity of compliance with, to effect a valid sale of shares.*]—1. Where an action was brought for breach of contract in refusing to sign certain promissory notes, the sale and delivery to the defendants of shares in a schooner being alleged as the consideration for the promise; and it appeared that the plaintiff had surrendered his interest to the defendants, and that they had continued in exclusive possession of the vessel; but that no assignment had been made as the statute directs, and no transfers indorsed on the registry, nor any new certificate of ownership granted, the court ordered a non-suit. But if the defendants had given their notes, they could not have resisted pay-

ment on the ground that they had not received a valid title. *Orser* v. *Cornelius Mounteny & Joseph Mounteny*, 625.

Incorporated company—Liability of shareholders — Pleading.]—2. Demurrers to declaration and pleadings, under the statute 1 Wm. IV., chap. 12. *Marmora Foundry Company* v. *Boswell*, 296. *And see Marmora Foundry Company* v. *Dougall*, 811.

SHERIFF.

A mandamus to the treasurer of a district to pay a sheriff's account, audited by the justices of the peace of his district in quarter sessions, was refused by the court; and the sheriff was left to his remedy against the treasurer, by indictment for breach of duty. *In re Hamilton (Sheriff)* v. *Harris (Treasurer of London District)*, 17.

STATUTES.

See PLEADING.—LIMITATIONS.

STATUTE LABOUR.

Statute labour—Where to be performed—Conviction not set aside, a protection to magistrate.] — 1. A party, to save himself from fine, must perform (when called upon) his statute labor within the division of the township in which he resides. A conviction made by a magistrate, so long as it has not been set aside, protects him against an action of trespass. *Gates* v. *Davenish*, 198.

Statute labour—Requisites of conviction.]—2. A proprietor of land cannot be compelled to do statute labour in the township in which the land lies, unless he is himself resident there. Where a form of conviction is not sanctioned by any express statute, it must be such as would be legal according to the principles of the common law; and in that case, a conviction which did not express that the party had been summoned, or that he appeared, nor that the evidence was given in his presence, cannot be supported. *Moore* v. *Jarron*, 579.

Statute labour—Authority of Village Council to impose a tax for.]—3. The municipal council of a village have authority to impose the performance of statute labour, or a tax in lieu thereof, only on those inhabitants who are not otherwise assessed. *In re Executors of the Hon. Robert Dickson* v. *The Mun. Coun. of the Village of Galt*, 581.

SUNDAY.

Sales on Sunday—Statute 8 Vic. 10, sec. 2.]—1. Under the 2d clause of the 8th Vic. 10, all sales of real and personal property made on a Sunday are void. *Semble* — That mortgages would not be void. *Lai* v. *Stall*, 205.

As to mortgages on a Sunday being void, under 8 Vic. ch. 45, sec. 2.]—2. The giving or taking in security on a Sunday is not void as "a buying or selling," within the Provincial Statute 8 Vic., ch. 45, sec. 2. *Wilt* v. *Lai senior & Lai junior*, 241.

Note made on Sunday in payment for goods sold, not void in the hands of an innocent indorsee, 8 Vic. ch. 45] —3. Under 8 Vic. ch. 45, sec. 2, a note made on Sunday in payment of goods sold on that day is void as between the original parties, but not as against an indorsee for value, and without notice. *Houlston* v. *Parsons*, 740.

SURVEY.

Erroneous survey — 12 *cl.* 59 *Geo. III, ch.* 14.]—1. Upon the facts of the case, it was held *per Cur.* that they had no authority under the 12th

cl. 59 Geo. III. ch. 14, to stay the proceedings until the defendant received the value of his improvements, or until the plaintiff conveyed the land in dispute. *Doe dem. Short* v. *Buss*, 374.

Township of Binbrook—Erroneous survey—Acts 1 Wm. IV. ch. 8, 7 Wm. IV. ch. 59, remedying same—Married women owning land in Binbrook.]—2. Under the statutes 1 Wm. IV, ch. 8, and Wm. IV. ch. 59, passed for the purpose of remedying an erroneous public survey, an inhabitant living in the front concession of the township of Binbrook cannot be dispossessed by an ejectment brought after a prior submission to arbitration, by the husband of a married woman owning land in the adjacent township of Saltfleet, the husband not being the owner of the land, to whom alone these acts apply. *Doe dem. Crooks* v. *Ten Eyck; Doe dem. Crooks* v. *Calder*, 245.

59 Geo. III., ch. 14—Erroneous survey — Improvements, when entitled to.]—3. Where the Government for any purpose has ordered a re-survey of a concession, and the surveyor so employed has planted posts to mark his survey, and the defendant has settled on a lot as marked by this last survey, the defendant in ejectment will not be entitled to his improvements under the acts 59 Geo. III., ch. 14, and 2 Vic., ch. 17, if the jury find that the plaintiff is holding according to the posts planted at the front angles of his lot in the original survey. The defendant in such case cannot be said to have settled on the land in consequence of an unskilful survey. *Doe dem. Moule* v. *Campbell*, 350.

TOLLS.

1. A person passing a toll-gate more than once on the same day, could not, while the statute 3 Vic. ch. 53, was in force, be legally charged more than one toll in the twenty-four hours. *O'Hara* v. *Foley*, 48.

Turnpike—Contract for rent—Tolls—Estoppel—Agency.]—2. A declaration on covenant stated that, by indenture made between the plaintiffs and defendants, the plaintiffs demised to the defendants the tolls authorised by law to be received upon a certain turnpike road, for the term of one year; that the defendants covenanted to pay a certain rent therefor; and *that by virtue of the said demise the defendants entered and were possessed for the term so to them granted.* Breach, non payment of the rent. *Held on demurrer*, that the defendants were estopped from denying the demise, and were bound by their express covenant to pay the rent, and that the non-execution by the lessors, under such circumstances, was no defence. And that they were also estopped from alleging the want of a common seal of the plaintiffs to the lease, or from pleading that they had no authority to demise. *Held also*, that a plea that the said indenture was not signed by the plaintiffs, or by any agent of theirs authorised in writing, was bad. *The Municipal Council of Frontenac, Lennox, and Addington* v. *Chesnut et al*, 619.

TRESPASS.

Trespass—Beach—Highwater mark—Lake Ontario—Grant by Crown.]—1. In an action of trespass for entering the plaintiff's close and digging post holes, and building a shanty, &c., and occupying the beach for the purpose of fishing. *Held*, that the Crown has the power to grant the beach to high water mark, and that the plaintiff was a trespasser, the patent having conveyed to the plaintiff the land to the waters of Lake Ontario. *Held also*, that no common law right exists to the public, to use

the beach above high water mark for the purposes of fishing, when the beach has been conveyed by the Crown to a subject. *Parker and Wife* v. *Elliott*, 333.

2. That the defendants' proceeding to straighten a highway, acting as trustees of the said highway, under a By-Law of the Municipal Council, passed in 1848, and under proceedings in General Quarter Sessions in 1823, and in so doing encroaching on the plaintiff's possession are not entitled to the protection of the statute 50 Geo. III., chap. 1. Nor can they give the special matter in evidence under the general issue. *Joy* v. *McKinn and Guess*, 265.

TRESPASS.

Pleading—Justification—12 *Vic., ch.* 81—12 & 14 *Vic., ch.* 64—*Demurrer.*]—Trespass, *quare clausum fregit.* The defendants justified under a by-law passed by the Municipal Council of the township of King, under the authority of which they alleged that they entered for the purpose of opening a new road laid out on the plaintiff's land. The 3rd and 4th pleas, which are set out in substance in the statement of the case below, were demurred to—among other causes: *Because* the Municipal Council had no power to establish and confirm a public road or highway. *Because* the plea did not aver any notice by the said corporation before making the said by-law, as required by the statute. *Because* the plea did not aver the laying out of the said road by a road surveyor, nor sufficiently describe the said road where it ran or at what point it commenced, and where it terminated; and because there is no averment that any by-law was made under which the said R. W. assumed to survey, lay out, &c. *Because* the plea did not aver that the said road did not run through any garden, &c., of the plaintiff, and for want of averment of consent of owner in writing. *And because* there is no averment of a reasonable time having been allowed plaintiff to open the said road, after the passing of the said by-law, before the defendants committed the said trespasses. *Held per Cur.*, that the municipal corporation had power *to open new roads* through any person's lands, *under the restrictions in the statute. Held also*, that no notice of such road was necessary, the word *opening* being omitted in 12 Vic., ch. 71, sec. 192, and that 13 & 14 Vic., ch. 64, could not apply to this by-law. *Held also*, that the plea was bad in not directly averring that the surveyor had laid out a road through the plaintiff's land, which he reported on 27th July, and that such road went through and over the *locus in quo*, and that the council confirmed that road. *And Semble*, that it would not be sufficient for a surveyor to lay out a road through a man's land of his own accord, and then to report it to the council, to entitle the council to establish it as a road, but that the surveyor must first act in consequence of a proper application or order. *Semble also*, that a by-law cannot be good which authorizes a road through a man's land without stating where it enters or what course it takes: and that the reference to the surveyor's report, without annexing it to the by-law, is not sufficient. *Semble also*, that the *plea* should have averred that the road was so laid out as not to run through or encroach upon any dwelling-house, &c., though it is not necessary that this should appear on the face of the by-law. *Semble also*, that the mere passing of a by-law should not be considered as *ipso facto* the opening of a road, but merely as authority to open it in a proper manner, and after reasonable time given to all parties. That the plea is defective for neither stating

that this was a wholly new road, nor (supposing it not to be so) that notice was given as would then be requisite. But *quære*, whether averment of notice would be necessary in any case. *Held also*, that the by-law was bad for referring proprietors to private parties for compensation, which they had no power to do — and because it directs a passage under the road to be made by parties whom they have no means of compelling to do so. *Held also*, that a party is not necessarily restrained by 155th sec. from bringing an action till the by-law has been quashed—for some of the objections would prevail, even though the by-law were perfectly legal. *Dennis* v. *Hughes et al*, 487.

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